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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutional due process and fair trial guarantees are violated by requiring a jury trial in a "hometown" forum where defendants are forced to choose between (1) an unrepresentative jury where the most qualified jurors are systematically excluded and (2) a biased jury.

2. Whether the constitutional due process and fair trial guarantees are violated by requiring a jury trial in a forum that has both a local interest bias and an economic interest in the outcome of the trial.

3. Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering public interest factors that indirectly promote competition in assessing any competitive impact of league controls of franchise locations.

4. Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering the pro-competitive benefits in the local market abandoned by the team seeking to move and may only consider the asserted pro-competitive benefits in the local market to which the team seeks to move.

5. Whether a sports league by-law specifying where the league's teams will conduct the league's business operations can be found to violate Section 1 of the Sherman Act.

PARTIES BELOW

Petitioner is the Oakland-Alameda County Coliseum, Inc., a non-profit corporation that operates a sports and enter-

tainment facility, including an outdoor stadium in Oakland, California.*

Respondents are the Oakland Raiders, Ltd., a member club of the National Football League and a former tenant of the Oakland Coliseum, and the Los Angeles Memorial Coliseum Commission, which operates a stadium and other athletic facilities in Los Angeles, California similar to those operated by petitioner.

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*The National Football League (NFL) and 27 of its 28 member clubs were defendants in the action. Those clubs are: Baltimore Football Club, Inc. (Indianapolis Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Foot Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Empire Sports, Inc. (Denver Broncos); San Francisco Forty-Niners; Seattle Professional Football; St. Louis Football Cardinals Company; and Tampa Bay Area NFL Football, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 726 F.2d 1381 (9th Cir. 1984) and appears as Appendix A, pp. 1a-52a. The order of that court denying a timely petition for rehearing and suggestion for rehearing en banc appears as Appendix F, pp. 102a-103a. The opinion of the District Court holding that the NFL location agreement is, as a matter of law, a conspiracy among independent business competitors within Section 1 of the Sherman Act, is reported at 519 F.Supp. 581 (C.D. Cal. 1981) and appears as Appendix B, pp. 53a-60a. The District Court's initial order denying the motion of petitioner and the National Football League for a change of venue is reported at 89 F.R.D. 497 (C.D. Cal. 1981) and appears at Appendix C, pp. 61a-96a. The March 1, 1982 order of the Court of Appeals denying the Oakland Coliseum and the National Football League's petition for a writ of mandamus on the venue issue appears as Appendix D, pp. 97a-99a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 28, 1984. A timely petition for rehearing and suggestion for rehearing en banc was filed and was denied by that court in an order entered on June 19, 1984. Jurisdiction in this Court is founded upon 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Sherman Act, 15 U.S.C. Section 1 (1982), provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Venue in federal court proceedings is governed in part by 28 U.S.C. Section 1404(a), which provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

The Oakland-Alameda County Coliseum, Inc. (Oakland Coliseum) is a nonprofit corporation that operates the Oakland-Alameda County Coliseum Complex pursuant to an agreement with the City of Oakland and the County of Alameda.[1] The Oakland Coliseum Complex includes an outdoor stadium that was the home of the Oakland Raiders from 1966 through 1980.

The Oakland Coliseum was constructed from 1964 through 1966 at a cost of over $26 million. The construction was financed by the sale of bonds whose repayment was guaranteed by the general funds of both the County of Alameda and the City of Oakland. Repayment of the bond obligations is approximately $1.5 million per year until 2004.

The American Football League and the Oakland Raiders, one of its original members, were without a home field in Oakland in 1960 and 1961, their first two years of existence. The City of Oakland, anticipating construction of the Oakland Coliseum, responded to the urgings of the AFL and the Raiders to establish a home field in the East Bay and (1) built the Raiders a temporary stadium at Youell Field in Oakland, and (2) then built the Oakland Coliseum, the Raiders' permanent home.

The Oakland Coliseum, knowing that franchise relocations were subject to League approval, relied on the rule requiring League approval before a franchise could be

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[1]There are *~~sixteen~~ cities* within Alameda County.

moved. The Oakland Coliseum and the taxpayers of Oakland and Alameda County built the Raiders a permanent home, guaranteed by over 60 million dollars in bond payments through the year 2004. The NFL, after its merger with the AFL, assumed the obligations of the AFL. The NFL Constitution and By-Laws contains Rule 4.3:

> "The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each club. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, *without prior approval of three-fourths of the existing member clubs of the League.*" (Emphasis added.)

From 1966 through 1980, the Oakland Raiders were one of the best supported and most successful franchises in professional football. The Oakland community supported the Raider team with 12 years of consecutive sellout crowds for their home football games during both the preseason and regular season.

In 1978, the Los Angeles Memorial Coliseum Commission (Los Angeles Coliseum) commenced this action against the NFL and all 28 of its member clubs, including the Oakland Raiders, claiming Section 4.3 of the National Football League's Constitution and By-Laws, requiring three-quarters of NFL members to approve any transfer of a franchise location, was illegally preventing it from obtaining an unspecified NFL team as a tenant. From 1978 until 1980, the Raiders, represented by NFL counsel, defended the validity of Section 4.3.

From 1979 into early 1980, the Los Angeles Coliseum and the Raiders secretly negotiated the move of the Raiders' franchise to Los Angeles. In January 1980, the Raiders publicly announced their intention to abandon Oakland and

unilaterally relocate in Los Angeles without seeking the required approval under Rule 4.3.[2]

REASONS FOR GRANTING THE WRIT

The Oakland Coliseum's Petition raises critical venue and antitrust issues that require resolution by this Court.

A. Venue

This highly publicized and sensational case, pitting Northern California interests against Southern California interests, ended when a Southern California jury held that it was unlawful for the National Football League to insist that the Oakland Raiders, one of the league's most successful and profitable franchises, remain an Oakland franchise.

Although the Oakland Coliseum and the NFL objected to having a Southern California jury hear the case, the trial court insisted the case be tried in Los Angeles. The trial court ignored the common perception, even among Los Angeles-area residents, that a trial of this issue in Los Angeles would not be fair to either Oakland or the National Football League.

Moreover, the trial of this case focused on the alleged deficiencies of the Oakland Coliseum as a site for a major league football team. In a very real sense, the Southern California jury was asked to decide, under the guise of an antitrust case, whether Los Angeles or Oakland was the better place for a football franchise to be located and, in addition, whether the Los Angeles Coliseum, a local public entity subsidized by local taxpayers, would benefit from obtaining such a franchise.

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[2]The Oakland Coliseum incorporates by reference the Statement of the Case submitted by the National Football League in its concurrently filed Petition for Writ of Certiorari.

1. The Oakland Coliseum and the NFL Were Denied a Representative Jury

In *Thiel v. Southern P. Co.*, 328 U.S. 217, 220 90 L.Ed. 1181 (1946), this Court commented:

> "The American tradition of trial by jury, considered in connection with either criminal or civil procedures, necessarily contemplates an impartial jury drawn from a cross-section of the community."

If it is impossible to select an impartial jury in a forum, a change of venue must be granted. *See, Groppi v. Wisconsin*, 400 U.S. 505, 510-511, 27 L.Ed.2d 571 (1971). The reasoning of *Groppi* is equally applicable where local prejudice makes it impossible to select an unbiased *representative jury.*

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04, 33 L.Ed.2d 83 (1972).

When the trial court insisted that this case be tried in Los Angeles rather than in a neutral district, the Oakland Coliseum and the NFL were forced to choose between two unconstitutional results—a biased jury or the systematic exclusion of a significant segment of the community. Constitutional principles can never be reconciled with the Hobson's choice given the Oakland Coliseum and the NFL of selecting either an impartial *or* a representative jury; the Oakland Coliseum and the NFL had a constitutional right to both.

The make-up of the jury should assure an "accurate application of the common sense of the community." *Ballew v. Georgia,* 435 U.S. 223, 234, 55 L.Ed.2d 234 (1978). This guarantee is especially important in a trial like this where the jury is asked, under the most generalized instructions, not so much to resolve disputed questions of fact as to make a fundamental value judgment: Is it "reasonable" for a sports league to require an established team to remain in its home community?[3]

The principal reason for the NFL's Rule 4.3 is the business benefits derived from franchise stability and fan loyalty. The success of the NFL and each of its teams is built on fan interest and loyalty, an emotional state that only sports fans can truly appreciate. Yet it was precisely this "segment of the community" which was systematically excluded from the jury.

Although football fans represent 38.9 percent of the Los Angeles general public and made up 45 percent of the original venire, all were excluded from the jury. There is no doubt that this exclusion of football fans was "systematic." The statistics speak for themselves: 77 percent of the jurors who said they were football fans were excused for cause, the overwhelming majority for bias. As a direct consequence of this exclusion of fans, there was a grossly disproportionate reduction of the chance of having men also on the jury. The exclusion of football fans affected five times more men than women.

An individual jury need not be a perfect mirror of the community. But that rule has no application to the systematic exclusion of identifiable segments of the community. *Duren v. Missouri,* 439 U.S. 357, 366, 58 L.Ed.2d 579 (1979).

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[3]Since the Raiders would be in a market that had two NFL teams wherever they operated, the competition effect of requiring the Raiders to continue in Oakland or move to Los Angeles was neutral. *See,* part B. 2, pp. 16-17, *infra.*

Here, the deviation from community norms was no accident. The fact that the jury had no football fans or men was not simply chance. It was preordained by insistence on trial in Los Angeles.

A rule expressly excluding Roman Catholics, blacks, Democrats, women or any other specifically identifiable segment of the community, would be unconstitutional on its face. The *de facto* effect of systematic exclusion of a representative segment of the community is equally unconstitutional. Football and sports fans, a readily identifiable segment of the community, should not have been excluded.

The overwhelming irony is that a simple change of venue to any locale other than Southern California or Northern California would have solved these constitutional problems with no prejudice to the Plaintiffs. If the case had been tried in Boise, Phoenix, Chicago, Des Moines, Atlanta or virtually any other city, sports and football fans would not have been biased in favor of the possibility of a Raider move to Los Angeles and would not have been challenged or excused for cause. The Oakland Coliseum and the NFL would have had a trial before a fair, impartial and representative jury.

The fact that the exclusion of a segment of the community resulted from the removal of biased jurors does not make that exclusion constitutionally legitimate. Any device violates the guarantee of a representative jury when "its conceded systematic impact is that only a very few [members of a cognizable group], grossly disproportionate to the number of eligible [group members] in the community, are called for jury service." *Taylor v. Louisiana,* 419 U.S. 522, 525, 42 L.Ed.2d 690 (1975). As this Court said many years ago:

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are under-

> mining processes and weakening the institution of jury trial, and should be sturdily resisted."

Glasser v. United States, 315 U.S. 60, 86 L.Ed. 680 (1942). *See also, Labat v. Bennett,* 365 F.2d 698, 724 (5th Cir. 1966) (en banc), *cert. denied,* 386 U.S. 991 (1967).

Oakland and the NFL were not entitled to a jury comprised of only sports fans, but sports fans cannot be systematically excluded.

Certiorari should issue whenever necessary to preserve the constitutional guarantee of trial by jury even from technical impairments. *See, Theil v. Southern P. Co., supra,* 328 U.S. 217; *Dairy Queen v. Wood,* 369 U.S. 469, 470, 8 L.Ed. 2d 44 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501, 3 L.Ed.2d 988 (1959). This guarantee includes the right to a trial by representative jury. This case involves an important denial of that right. Certiorari should be granted.

2. Los Angeles Jurors Should Have Been Disqualified for Their Financial Interest in the Verdict

Forcing the Oakland Coliseum and the NFL to try this case before jurors who had an economic interest in their verdict was a denial of due process under the Fifth Amendment. Courts have long recognized that a finder of fact with an interest in the outcome of a trial cannot meet the constitutional requirement of impartiality. *Withrow v. Larkin,* 421 U.S. 35, 47, 43 L.Ed.2d 712 (1975); *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 21 L.Ed.2d 30 (1968); *Chestnut v. Ford Motor Company,* 445 F.2d 967 (4th Cir. 1971).

Thus, when a judge, as fact finder, has an interest which would offer a *possible* temptation to the average man ". . . not to hold the balance, nice, clear and true . . ." his service as the finder of fact constitutes a denial of due process. *Ward v. Monroeville,* 409 U.S. 57, 60, 34 L.Ed.2d 267 (1972)

quoting Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749 (1927).

Moreover, courts have long recognized that appeals to the pecuniary interest of jurors are improper. *See, Epperson* v. *United States,* 490 F.2d 98 (7th Cir. 1973).

Half the jury were property owners and taxpayers in Los Angeles County. These jurors had a direct financial interest in the verdict for Los Angeles and the evidence inevitably created a "possible temptation" for those jurors to vote in favor of their pocketbooks. During both trials, counsel for Plaintiffs repeatedly highlighted the significant economic gain to Southern California in obtaining the Oakland Raiders. It was uncontradicted that the mere presence of a professional football franchise in a community would draw ***millions*** of dollars into the local economy, preventing the possibility of a financial burden on local taxpayers.

In this era of economic stress jurors are especially sensitive to economic arguments. In fact, even before the massive publicity generated by the retrial, 40 percent of the prospective jurors believed that an NFL team in the Coliseum would mean significant economic benefits for the Los Angeles area and its residents.[4] CR 1025 at 12, 100.

Plaintiffs recognized the importance of appealing to the jury's financial interest as taxpayers and called Kenneth Hahn, a senior member of the Los Angeles County Board of Supervisors, who told the jury the presence of the

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[4]Because of voir dire's well-known tendency to produce self-justifying answers, *Irvin v. Dowd,* 366 U.S. 717, 728, 6 L.Ed.2d 751 (1961), CR 893 at 18-19, questionnaire answers undoubtedly understate the real extent of perceived financial interest. For example, an opinion survey conducted prior to the second trial indicates that 49 percent of Los Angeles County residents "strongly" agreed and 35 percent agreed "somewhat," for a total of 84 percent, that Los Angeles would benefit economically from the Raiders' move. Such a jury pool cannot be considered to be unbiased and impartial.

Raiders in the Los Angeles Coliseum was critical to the economic well being of the County of Los Angeles.[5]

To make sure the jury understood the economic impact of a vote for the Plaintiffs, William Robertson, Commissioner for the Los Angeles Coliseum, testified that it was necessary to have the Raiders

> ". . . to generate enough money so that [the Los Angeles Coliseum] will not be a burden on the taxpayers . . ." 16 TR.2d 3182.

The Southern California taxpayers on the jury therefore could not avoid "a possible temptation" to vote in Plaintiffs' favor without disregarding the direct, uncontradicted testimony of both Hahn and Robertson that the verdict would affect them as taxpayers.[6]

The well-settled rule against jurors deciding a case in which they have a financial interest is based upon experience which "teaches that the probability of actual bias on the part of the judge or the decision maker is too high to be constitutionally tolerable . . . [in a case] in which the adjudicator has a pecuniary interest in the outcome . . ." *Withrow v. Larkin, supra,* 421 U.S. at 47.

This Court has followed the rule that the "slightest pecuniary interest" by the fact finder is sufficient to require disqualification. *Tumey v. Ohio, supra,* 273 U.S. at 524-531.

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[5]Indeed, counsel for both the Los Angeles Coliseum and the Raiders expressly *conceded* the fact that Los Angeles taxpayers would benefit from the Raiders' move. 2 TR.2d 85-86.

[6]A survey of the Los Angeles area taxpayers revealed that when they were told of the financial benefit resulting from the Raiders' move, there was a dramatic shift of opinion towards the Los Angeles position. CR 1025 at 6, 10-11.

Here the constitutionally impermissible economic interest clearly tainted every Los Angeles juror that decided the case.[7]

Los Angeles' claim that the stake of an individual county taxpayer in the outcome of this action was too small to be grounds for disqualification conflicts with previous decisions of this Court. The "requirement of neutrality has been jealously guarded by [this Court]." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L.Ed.2d 182 (1980). For example, it is equally unlikely that a mayor would be influenced by the effect that a $50 or $100 fine might have on a city's finances. In *Ward v. Village of Monroeville, supra*, 409 U.S. 57, this slight economic interest required disqualification as a matter of law.

The test is not actual bias, but the existence of the "slightest pecuniary interest" that offers a "possible temptation" to the average man. *Tumey v. Ohio, supra*, 273 U.S. at 524, 532. The pecuniary interest of Los Angeles County taxpayers in this case was far more substantial than the financial temptations facing the public officials in *Ward* or *Tumey*.

The economic interest of the Southern California jurors —intentionally magnified by the evidence presented to it— clearly created the existence of probable bias against the Oakland Coliseum and the NFL, depriving them of the right

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[7]The State of California has legislatively recognized that an appearance of bias exists when a dispute involving a local agency is resolved by a jury of its own taxpayers. California Code of Civil Procedure Section 394(1) requires that actions brought by a county, city or local agency against nonresidents of that county or city must be tried in a neutral county. Thus, had this case arisen in a California State Court, under Section 394(1) Oakland and the NFL would have had an automatic right to change venue to a neutral county since the Los Angeles Coliseum is a local agency. Federal courts should not disregard so clear a statutory public policy furthering impartial justice.

to a financially impartial jury guaranteed by the Constitution. The trial court had no discretion to abridge that guarantee. The Constitution protects against a probability of bias; actual bias need not be shown. *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed.2d 424 (1965); *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3rd Cir. 1965).

B. Antitrust

1. The Courts Below Precluded the Jury from Considering the Public Interest Factors That Indirectly Promote Competition in Assessing Any Competitive Impact of League Controls of Franchise Locations

The Oakland Coliseum and the NFL requested that the trial court instruct the jury regarding the public service aspects of the application of Rule 4.3 to the proposed transfer of the Oakland Raiders franchise to Los Angeles. They requested that the Court instruct the jury that:

> "The antitrust laws recognize that certain . . . businesses . . . have public service aspects which require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently . . .
>
> . . .
>
> . . . If you determine that Rule 4.3, as applied in this case, serves the public interest, and furthers the League's public service obligations, you should take that into account in assessing its reasonableness under the antitrust laws . . ."

See, Goldfarb v. Virginia State Bar, 421 U.S. 773, 787, n.17, 44 L.Ed.2d 572, 585 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 55 L.Ed.2d 637 (1978); *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1977).

The trial court rejected that requested instruction.

The facts before the jury were clear. At the urgings of the Oakland Raiders and the League, the Oakland Coliseum had been constructed. The construction of the Coliseum was a major community (sixteen cities) undertaking committing Alameda County taxpayers to a multi-million dollar debt service into the twenty-first century. The public investment in, and construction of, the Oakland Coliseum produced competitive benefits by increasing competition in Northern California in professional football and other professional sports. The investment in the Oakland Coliseum was undertaken in reliance on the promise of the League that the Raiders would not be moved if they were given reasonable support in Oakland.

The NFL's refusal to approve the Raiders' abandonment of Oakland was based on its concern for the public interest aspects of stable franchises in communities where the League had been given strong support by public investment in stadia facilities and strong support from local fans. The NFL had not approved a transfer outside a "home territory" in 20 years; the League believed a policy of loyalty to communities was good business and would obviously promote the League's overall interests, goodwill, public investments in stadia for NFL teams, and the public's sense of fairness in their perception of how the NFL treats communities who invest millions in its business. Many cities throughout the United States subsidize the NFL's business by building public stadia.

These facts presented strong public service factors that indirectly promoted competition and justified the application of the NFL's Rule 4.3 in the context of the Raiders' proposed move. Indeed, Oakland and the Alameda County communities were obligated to a multimillion dollar bond commitment to the benefit of the Raiders that stretched over 40 years. The NFL was committed in fairness to protect the various communities' investment in *its*—the NFL's —business.

This Court has made its views clear on the public service aspects of the antitrust laws on numerous occasions.

In *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56-57, n.20, 70 L.Ed.2d 810 (1982), Justice Brennan noted the standard for antitrust liability involving actions by local government. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417, n.48, 55 L.Ed.2d 364 (1978), Justice Brennan previously had stated that certain business activities—while otherwise anticompetitive in nature—require a different analysis when the activity is conducted in the public's interest.

In any antitrust action involving public interest considerations, it is crucial that the jury be instructed regarding the weight and appropriateness of such considerations to a "rule of reason" analysis. The trial court's refusal to instruct the jury that public service factors related to public investment in facilities for professional sports leagues are "rule of reason" benefits left the jury with a distorted impression of the antitrust standards it was to follow. Public service evidence was the key justification for the NFL enforcing its constitution and Rule 4.3 and despite this the jury was not instructed on the analysis to apply to this evidence.

In instructing the jury, the trial court instead provided the jury with a unique, quixotic "rule of reason" instruction stating merely that the antitrust laws do not leave a jury "free to consider every possible benefit that Rule 4.3 may have . . ." 32 TR.2d 7216. The instruction given was derived from an out-of-text quotation from *Professional Engineers* which had the effect of compounding the prejudicial impact of the refusal to instruct on public service considerations. By instructing the jury that it was not free to consider "every possible benefit" of the rule, the trial court led the jury to believe it *could not* consider the public interest aspects of the application of the rule

unless it could see a *direct* connection between Rule 4.3 and an increase in competition. The trial court refused to instruct the jury that public service factors could be *indirect* pro-competitive factors that could be considered "differently" than other business practices despite the fact that this Court has stated it is "unrealistic" not to consider practices that have public service aspects differently than ordinary business practices. *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 687, *quoting, Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 788-89, n.17.

On the whole the trial court's instructions grossly misrepresented the "rule of reason" cognizance of pubic service considerations. Even in *Professional Engineers,* when the Court stated that the rule "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," [*National Society of Professional Engineers v. United States, supra,* 435 U.S. at 688], the Court reaffirmed that the rule is open to consideration of public service aspects and that such practices are to be judged differently than ordinary business. *Id.* at 687.

The Court of Appeals upheld the refusal to instruct regarding public service aspects of the rule of reason on the grounds that only "procompetitive" benefits could be considered.[8] (App. A, p. 30a.)

The Court of Appeals held that in any event, since counsel were permitted to argue that public service could be pro-competitive, the instruction was unnecessary. (App. A,

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[8]The only guidance from the trial court in the public interest area actually compounded the Court's error. The jury was instructed that Los Angeles had a "legitimate public interest" in the acquisition of a professional football team sufficient to justify the expenditure of public money.

p. 30a.) This ruling is contrary to the law of the Ninth Circuit, [*see, Boddicker v. Arizona State Dental Ass'n., supra,* 549 F.2d 626], and erroneous under *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 687.

Contrary to the Court of Appeal's opinion (App. A., p. 30a), argument of counsel is an unheard-of substitute for proper instructions from the court. In fact, the other instructions given warn the jury that they could not accept argument of counsel on a par with instructions as to issues of law.

The errors in instructions in this case must be corrected. This case presents ideal facts for the Court to properly define the role that public interest should have in a rule of reason analysis.

2. The "Rule Of Reason" Instruction To The Jury Ignored The Interests Of Northern California Consumers

This Court has consistently identified consumer welfare as the principal goal of antitrust policy. For example, in condemning the television plan challenged in *NCAA v. Board of Regents of Univ. of Oklahoma,* ..... U.S. ....., 82 L.Ed.2d 70 (June 27, 1984), the Court held that the agreement was "unresponsive to consumer preference. This . . . point is perhaps the most significant since 'Congress designed the Sherman Act as a "consumer welfare prescription." ' " *Id.* at 87-88, *quoting, Reiter v. Sonotone Corp.,* 442 U.S. 330, 343, 60 L.Ed.2d 931 (1979).

In this case, any competitive effects of preventing a Raiders move to Los Angeles were at least offset by the competitive effects of maintaining the Raiders in Northern California, where for 21 seasons they had operated within seven miles of the San Francisco 49ers. Any projected business competition between the Rams and the Raiders was already taking place between the Raiders and the 49ers

in Northern California. Any competition created by the move to Los Angeles came at the expense of suppressing an equivalent amount of competition in the Bay Area. Thus, to the extent that those who consume the NFL product in the Los Angeles area benefit from direct competition between the Raiders and the Rams, those who consume the NFL product in Northern California lost the benefits of direct competition between the Raiders and the 49ers.[9]

The trial court, however, refused to instruct the jury that it could consider the extent to which the increase in Rams-Raiders competition was offset by the decrease in 49ers-Raiders competition. CR 2042 at 3-4, Attachment D. While the Court of Appeals dismissed this as "a fact question that could be argued to the jury" (App. A., p. 30a), it was legal error to fail to instruct the jury on the central legal significance of such evidence. As the Court said in *NCAA v. Board of Regents of Univ. of Oklahoma, supra,* 82 L.Ed.2d at 84, an overall assessment of a restraint's competitive effects is required, and "a restraint in a limited aspect of a market may actually enhance marketwide competition."

Similarly, the Court of Appeals disregarded the effect on competition in Northern California and found the restraint imposed by NFL Rule 4.3 unreasonable because it prevented "direct competition between the Rams and Raiders [which] would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area." (App. A, p. 23a.)

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[9]The District Court recognized the fact that competition was not unique to Southern California:

> "At present, the location of the San Francisco Forty-niners vis-a-vis the Oakland Raiders . . . suggests that these . . . teams compete for dollars found in the pockets of football fans." *Los Angeles Memorial Coliseum v. N.F.L.,* 468 F.Supp. 154, 163 (C.D. Cal. 1979).

This antitrust law requires more than a tunnel-vision focus on the interests of Los Angeles-area consumers. Without an assessment of the effect of the NFL's location decision on the interests of Northern California consumers, no accurate determination of Rule 4.3's impact on competitive conditions could be made. Moreover, by focusing *only* on the effects of the league agreement in Southern California, the lower courts ignored this Court's mandate that an essential element of every Sherman Act violation is a restraint on commercial competition as opposed to a restraint merely on the activities of any one competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L.Ed.2d 510 (1962).

Nothing in the Sherman Act favors competition in Southern California over competition in Northern California. The result below, however, is entirely predicated on the assumption that the competitive effects in one location can be divorced from the *identical competitive effects* in another directly affected market. This Court has repeatedly rejected such an approach. *NCAA v. Board of Regents of Univ. of Oklahoma, supra*, 82 L.Ed.2d at 84; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L.Ed.2d 568 (1977). Although repeatedly urged both at trial and to the Court of Appeals, this fundamental antitrust principle was squarely rejected by the courts below.

Whatever may be necessary to instruct a jury in a normal case, in this trial where a Southern California jury was required to assess the competitive effects of a challenged practice in both Northern and Southern California, it was essential for the trial court to instruct on the issue. It was also fanciful to expect a Los Angeles jury to consider the interests of Bay Area consumers in the absence of specific guidance from the trial judge.[10]

[10]Moreover, in its charge to the jury, the trial court specifically noted Respondents' contention that "the relevant geographic market is the Los Angeles metropolitan area." 32 Tr.2d 7213.

3. As a Matter of Law, the Location of League Teams According to a League Bylaw Provision Cannot Be Deemed a Violation of Section 1 of the Sherman Act

The courts below wrongly viewed the NFL as merely a form of voluntary "cooperation" among otherwise independent business competitors. But the reality, as Justice Rehnquist has recognized, is that the very nature of a sports league product *requires* joint production in unified action:

> "The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market." *National Football League v. North American Soccer League,* 459 U.S. 1074, 1077, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting from denial of certiorari).

Every other Court of Appeals to review NFL operations has concluded that the League is a lawful joint venture and not a collection of business competitors.[11] By contrast, the majority below held that the NFL was nothing more than "an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act." (App. A, p. 12a.) As the dissent noted, "[t]he majority's holding places the Ninth Circuit's ruling *in conflict with every other circuit to consider this issue.*"[12] (App. A, p. 42a.) (emphasis supplied).

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[11] *See, e.g., North American Soccer League v. National Football League,* 670 F.2d 1249, 1251 (2nd Cir.), *cert. denied,* 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C. Cir. 1978); *Mackey v. National Football League,* 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

[12] In treating the NFL as merely an association of 28 independent business competitors, the lower courts expressly relied on cases disapproved and overruled by this Court in *Copperweld Corp. v. Independence Tube Corp.,* ... U.S. ..., 81 L.Ed.2d 628 (June 19, 1984).

The members of the NFL do not exist or operate independent from the League itself, and the courts below plainly erred in holding that individual League members can produce a product. No individual club can produce a single game, let alone a season of NFL football and an annual postseason tournament. As Judge Williams explained:

> "The product distributed by the member clubs is not analogous to ball bearings, mattresses, or groceries, because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sandlot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of 'separate business entities whose products have independent value' banded together in *de facto* cartel." (App. A, pp. 46a-47a.) (citations omitted).

That the value of a sports team depends entirely on that team's membership in a league is evident from the positions of the Oakland Coliseum and the Los Angeles Coliseum. Both wish to have *NFL Football.* The difference in their positions is that the Oakland Coliseum recognizes that the only party that can sell league entertainment is the League itself which operates as "a single unit competing as such with other similar professional leagues." *San Francisco Seals, Ltd. v. National Hockey League,* 379 F.Supp. 966, 970 (C.D. Cal. 1974). By contrast, the Los Angeles Coliseum seeks to transform a league into something it is not, and to secure the league product by dealing with only one league member.

Within a professional sports league, the members act as partners or joint venturers who must necessarily agree on many aspects of their joint activities, *including* where their operations will take place. The Oakland Coliseum so recognized this in its dealings with both the AFL and

the NFL, as well as major league baseball. In each instance, the Oakland Coliseum sought a *league* grant of a team franchise. *Nahas,* 28 Tr.2d 6228-29. The dissenting opinion in the Ninth Circuit opinion recognized that the Raiders have challenged only one aspect of a larger agreement:

> ". . . [E]mphasis upon . . . legal formalisms obscures the reality of life in the N.F.L. . . . The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit." (App. A, p. 40a.)

This principle has been recognized in numerous other business contexts. Agreements limiting internal competition among participants in a common enterprise are commonplace, particularly among partnerships such as law firms. No law firm would be required to allow its partners to compete with one another for clients, office space, or the services of staff members.[13] These and similar restraints are inherent in the formation of a partnership or joint venture relationship and have never been regarded as subject to attack under Section 1. *See, e.g., United States v. Addyston Pipe and Steel Company,* 85 F. 271, 280 (6th Cir. 1893), *aff'd. as modified,* 175 U.S. 211 (1899).

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[13]A leading commentary, described by the majority below as "persuasive," (App. A, p. 13 n.4), has suggested that a sports league should be regarded as the equivalent of a law firm partnership for Section 1 purposes. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model,* 82 Mich. L. Rev. 1, 5 (1983). *See also,* Weistart and Lowell, *The Law of Sports,* § 5.11 at 757-58 (1979).

A league does not exist to foster internal business competition among the league members. The Raiders were not issued a franchise by the American Football League in 1960 to engage in business competition with the other AFL members, but instead to further that League's joint business operations. When the Raiders encountered early financial difficulties, the other AFL clubs contributed funds to strengthen the club, worked to secure improved stadium facilities, and sought to preserve the Raiders' operations in Oakland. These are not the actions of business competitors seeking to put one another out of business, but rather of partners in a common business venture. Similarly, when the Raiders were extended an NFL franchise as a result of the NFL-AFL merger, they were not admitted to compete economically with the other NFL clubs, but rather to contribute to the NFL's joint business operation.

CONCLUSION

This case involves legal principles of constitutional dimension that affect cities throughout the United States. Where cities are involved in litigation of this nature—literally pitting Northern California interests against Southern California interests—the trial venue should never be allowed in the home court of either. To do so, as demonstrated, denies the constitutional rights to a representative jury and a jury without financial interest in the outcome.

Section 1 of the Sherman Act was never intended to apply to League decisions regarding franchise locations. The NFL is a lawful joint venture and not a collection of business competitors.

Assuming this case truly involves what was intended by the Sherman Act, then certainly the sixteen Northern California cities that invested millions in the NFL League and the Oakland Raiders can expect the trial court to:

1. Instruct the jury that public service considerations aside from competitive impact must be considered under a "rule of reason" analysis of Rule 4.3.

2. Adequately instruct the jury, it must consider the anticompetitive effect in Northern California as well as the procompetitive effect in Southern California of the Raiders' unilateral move to Los Angeles.

The Court of Appeals' opinion has created havoc in Oakland, Baltimore and around the country by its venue and anti-trust decisions. These decisions demonstrate the need for guidance from this Court. Certiorari should be granted.

Respectfully submitted,

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No. 84-

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

Nos. 82-5572 to 82-5574, 82-5664, 82-5665, 83-5714, 83-5732 and 83-5938
Argued and Submitted April 7, 1983
Decided Feb. 28, 1984

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants/Cross-Defendants Appellants/Cross-Appellees.

Before:

ANDERSON AND NELSON,
Circuit Judges,

and WILLIAMS,
*District Judge.**

Appeals from the United States District Court for the Central District of California.

J. BLAINE ANDERSON, *Circuit Judge:*

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D.Cal.1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the

rule to require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raider's relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the

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[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote: any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record # 931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

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[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that

(footnote continues)

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States* v. *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S.Ct. 2465, 2472, 73 L.Ed. 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65, 31 S.Ct. at 517. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine

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(footnote continued)

judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed.R.Civ.P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion: its denial of the motion is not an appealable order. *Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir.1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

whether that restraint promotes or restrains competition. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243. 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. *Single Entity*

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed.R.Civ.P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656,661 (9th Cir.), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary* v. *Nat'l Distillers and Chemical Corp.,* 505 F.2d 695, 696 (9th Cir.1974). Our review is *de novo. Santa*

Clara Valley Distributing Co. v. *Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir.1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of

the Sherman Act. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, F.2d 606 (8th Cir.1976); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1985-1986, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.*, M.

Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir.1983); *see Thomsen* v. *Western Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 348, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir.1979), *cert. denied*, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 65 S.Ct. at 1427, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc.* v. *Columbia Broadcast System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1

(1979);[3] *see also Silver* v. *New York Stock Exchange*, 378 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

The case of *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 87 S.Ct. at 1849-1850, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to *Sealy*).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution,

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[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc.* v. *American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir.1980), *cert. denied*, 450 U.S. 970. 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir.1983).

which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 87 S.Ct. at 1850, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 at 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 796-801 (1965).

B. ***Rule of Reason***

In *Chicago Board of Trade* v. *United States*, 246 U.S. 281, 288, 88 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918), Justice

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 965 (C.D.Cal.1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich.L.Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals* v. *Abbott Laboratories*, ___U.S.___ _____, 103 S.Ct. 1011, 1016-17, 74 L.Ed.2d 882, 890-91 (1983); *see also United States* v. *Cooper Corp.*, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'" *Cascade Cabinet,* 710 F.2d at 1373 (quoting *Northrop Corp* v. *McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet,* 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan* v. *Burroughs Corp.,* 611 F.2d 286, 290 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.,* 699 F.2d 1292, 1296 (9th Cir.1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member

clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan*, 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.; see Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League*, 670 F.2d 1249; *Smith* v. *Pro Football, Inc.*, 598 F.2d 1178 (D.C.Cir.1978); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). On the one

hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700, 705 (1927); *United States* v. *Topco Associates*, 405 U.S. at 611, 92 S.Ct. at 1135, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir.1983). Instead, we must examine Rule 4.3 v. Western whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility,

weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n. 21, 97 S.Ct. at 2559 n. 21, 53 L.Ed.2d at 582, n. 21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take

> significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 88C, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see S. J. von Kalinowski, *Antitrust Laws and Trade Regulations*. § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan*, 611 F.2d at 292 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2

billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one

another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams in presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. *The History and Purpose of Rule 4.3*

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however,

the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 848, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason*, *supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798: *see Addyston Pipe, 85 F. at 281-82; Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith* v. *Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL agrues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of

major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League*, 459 U.S. 1074, ____, 103 S.Ct. 499, 502, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend*, 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1228-30 (9th Cir.1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of

Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 803. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments

ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568, 581. n. 19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56, 97 S.Ct. at 2558-2560. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities,

regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws,* 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver* v. *New York Stock Exchange* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen* v. *Professional Golfers Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligiblity of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders

respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed.R.Civ.P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell* v. *Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir.1982); *Van Cleef* v. *Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir.1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir.1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc.* v. *Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 138 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member

clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, 712 (1977); *see also Kapp* v. *National Football League,* 586 F.2d 644, 648 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat,* 429 U.S. at 491, 97 S.Ct. at 698, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of

entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 98 S.Ct. at 1365, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy* v. *Florida*, 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589, 597 (1975); *see Smith* v. *Phillips*, 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-945, 71 L.Ed.2d 78, 85-86 (1982); *Chandler* v. *Florida*, 449 U.S. 560, 581-582, 101 S.Ct. 802, 813, 66 L.Ed.2d 740, 756 (1981); *United States* v. *Bailleaux*, 685 F.2d 1105, 1109 (9th Cir.1982); *United States* v. *Brown*, 540 F.2d 364, 379 (8th Cir.1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert* v. *Florida*, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 3202-3203, 53 L.Ed.2d 344, 361-362 (1977); *Murphy* v. *Florida*, 421 U.S. at 800-802, 95 S.Ct. at 2036-2037, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy*, 421 U.S. at 798, 95 S.Ct..at 2035, 44 L.Ed.2d at 594. No such

showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R.2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 48 L.Ed.2d 712 (1975), and *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464, 48 L.Ed.2d at 728. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568, 571 (E.D.Va.1975); *cf. United States* v. *Brown* 540 F.2d 864. 379 (8th Cir.1976) (there was no basis to strike

jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir.1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

SPENCER WILLIAMS, District Judge, Sitting by Designation, concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. *The Relevant History of the N.F.L.*

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the abovementioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have

[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. ***The History of the Present Action.***

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. ***The Various Appeals Pending before this Court.***

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that

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[2] See Majority Opinion at 1392-1394, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was

submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not ... sufficient (evidence) to preclude the jury from finding otherwise." *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.1982) (*per curiam*).

In *Murray* v. *Toyota Motor Distributors, Inc., supra,* the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (wa)s *not* "compelling", since it should have been submitted to the jury once there was simple "persuasive" evidence on either side. *C.f., Majority Opinion* at 1387.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir.1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal

organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfretted by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive entities injured as result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra,* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.,* "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold

themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F.Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . . , the N.F.L. teams *are not true competitors, nor can they be.*

Majority opinion, at 1391, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League* v. *N.F.L.,* 670 F.2d 1249, 1251 (2d Cir.1982); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C.Cir.1978); *Mackey* v. *N.F.L.,* 543 F.2d 606, 619 (8th Cir.1976); *Mid-South Grizzlies* v. *N.F.L.,* 550 F.Supp. 558, 562 (E.D.Pa.1982); *U.S.* v. *N.F.L.,* 116 F.Supp. 319, 323-324 (E.D.Pa.1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions

arising in professional hockey and basketball, realized that it is nonsensical to emphasize intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966, 969-971 (C.D.Cal.1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin* v. *National Basketball Association,* 885 F.Supp. 149, 150, 152 (S.D.N.Y.1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be an "unincorporated joint venture". *N.A.S.L.* v. *N.F.L., supra* at 1257, (2d Cir.), *cert. denied,* ____U.S.____, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.,* a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L.* v. *N.L.R.B.,* 613 F.2d 1379, 1382 (5th Cir.1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc.* v. *Southwestern P.A., etc.,* 670 F.2d 421, 429, n. 11 (3d Cir.1982), citing *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1178 (D.C.Cir.1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically independent entities from supplying goods and services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant indentities apart from the collective N.F.L. for the limited purposes of their

extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the crucial distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra*, (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1061 (C.D.Cal.1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman* v. *World Hockey Association*, 439 F.Supp. 1315, 1322 (D.Conn.1977); *Kapp* v. *National Football League*, 390 F.Supp. 73, 81-82 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs

of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . ."); *cf.*, *North American Soccer League, et al.* v. *N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mecha-

nism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc.* v. *Columbia Broadcast Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of non-severable and indistinct product—professional football. See generally, *Quirk, An Economic Analyisis of Team Movements in Professional Sports*, 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)), mattresses (*U.S.* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967)), or groceries (*U.S.* v. *Topco Associates*, 405 U.S. 596, 598, 92 S.Ct. 1126, 1128, 31 L.Ed.2d 515 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have

independent value" (519 F.Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al.* v. *United States*, 326 U.S. 1, 18, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling

that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir.1983) *cert. granted*, ____U.S.____, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983).

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman* v. *N.F.L.*, 402

F.Supp. 754 (D.Minn.1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich* v. *N.F.L.* 352 U.S. 445, 453-54, 77 S.Ct. 390, 394-95, 1 L.Ed.2d 456 (1957) and particularly *American Football League* v. *N.F.L.*, 323 F.2d 124, 131 (4th Cir.1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966, 971-72 (C.D.Cal.1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a § 2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of

this theory has been the player draft litigation; the distinction between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L.* v. *N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and Raiders. I

would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate § 1 of the Sherman Act. The Judgment of the district court should be reversed and judgment entered for the N.F.L. and its codefendants.

APPENDIX B

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—July 24, 1981

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order granting directed verdict for plaintiff and cross-complainant on single entity issue

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PREGERSON, *Circuit Judge:*

This matter is before the court on crossmotions filed, pursuant to Fed.R.Civ.P. 50(a), by the plaintiff Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, seeking entry of a directed verdict with respect to the defendants' contention that the NFL is a single economic entity for purposes of this lawsuit and hence cannot as a matter of law have violated section 1 of the Sherman Act. Having studied the parties' briefs and heard the oral argument of counsel on July 24, 1981, the court concludes that the motions of the Coliseum Commission and the Raiders should be granted and that of the NFL denied.

The Los Angeles Memorial Coliseum Commission originally moved before trial for partial summary judgment on the single entity issue. The court denied that motion because it appeared that proper resolution of the issue could well depend on the factual evidence adduced at the trial. Because summary judgment is proper only when it is quite clear what the truth is, *Poller* v. *CBS,* 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), a district court may properly deny summary judgment even where it would be technically proper, so that the case may be fully developed at trial. *Roberts* v. *Browning,* 610 F.2d 528, 536 (8th Cir.1979).

That development has now occurred, and it is apparent that there are no genuine issues of material fact concerning the single entity question. The parties' disagreement concerns the legal effect to be given to the undisputed facts. The question is a close one, and the court has benefitted greatly from the briefs and oral arguments of the parties. Careful consideration of the legal arguments put forward by the Coliseum and by the NFL have convinced this court that the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.

On its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise. The twenty-eight member clubs are separate legal entities—some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records.

The Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case. Firms with a high degree of common ownership have been held separate for Sherman Act purposes. *See Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 597-98, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

Inc., 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947). Indeed, even a parent corporation and its subsidiary have been held separate entities in a Sherman Act context: since they had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 982 (1968).

The Ninth Circuit has taken a similarly unreceptive view of single-entity claims, as demonstrated by *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity when it possesses *none* of those features.[1]

The League argues, however, that the unitary nature of the product it creates—NFL football—necessarily implies that it is a single entity. "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member." *NFL Opposition* at 3. This argument suffers from several defects.

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[1] The NFL is not the "parent" of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. And the NFL itself has conceded that "the existence of actual or potential interclub competition in certain areas is not disputed." *NFL's Opposition to Motion for Partial Summary Judgment*, filed February 20, 1981 [hereinafter *NFL Opposition*], at 29.

In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Kapp* v. *NFL*, 390 F.Supp. 78 (N.D.Cal.1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir.1978).[2]

Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. The clearest instance is *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where Associated Press bylaws aimed at preventing competitors of existing members from joining the association were held unlawful. Associated Press was an incorporated membership association whose members were newspapers. It gathered and distrubuted "news which [its] member papers cannot collect single-handed, and which requires their pooled resources." *Id.* at 26 (Frankfurter, J., concurring). This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom

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[2] The NFL argues that the player cases are distinguishable because they challenged NFL conduct in a different market—the market for player services, rather than the market in which NFL football is sold. "In the player market club had the capacity to employ players without necessarily involving other clubs in such contracts." *NFL Opposition* at 39. The distinction is unconvincing. Each club likewise has the capacity to lease a stadium without involving the other clubs in its contract. Of course, the other clubs will be "involved" in the sense that they will have to play in the leased stadium. But they are similarly "involved" when one club employs a player in the sense that they will have to play against that player. In short, players no less than stadiums are a factor in producing professional football, and if the nature of professional football makes its producer, the NFL, a single entity, that conclusion would apply as much in the player market as in the stadium market.

had the facilities or resources to produce AP's stream of worldwide news. Yet the Court had no trouble finding AP's anticompetitive bylaws a restraint of trade.[3] Likewise, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, 83 S.Ct. 1246, 1261, 10 L.Ed.2d 389 (1963), the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold"—a function that none of its individual broker-members could perform on its own. *Id.* at 349, 83 S.Ct. at 1253.[4]

A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual NFL clubs are not separate business entities whose products have an independent value. The League may be correct when it characterizes its member clubs as "[e]ntities which have capacity to be competitors *only* when acting jointly with members of a common enterprise." *NFL Brief on Cross-Motions for Directed Verdict re Single Entity*, filed July 23, 1981 [hereinafter *NFL Brief*], at 21. But this means only that each club must act jointly with *some* other teams in *some* cooperative framework in

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[3] *See also United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941), affirming the conviction of four corporations for violating section 1 of the Sherman Act. The defendants were GM, its sales and financing subsidiaries GMSC and GMAC, and a subsidiary of GMAC. The defendants had argued that they all directed their operations "toward one end, the manufacture and sale of General Motors automobiles," *id.* at 384, and that GMAC and its subsidiary were thus merely parts of one common enterprise engaged in the unitary business of making and selling GM cars. The court rejected this defense. *Id.* at 404.

[4] The NFL would distinguish *Associated Press* and *Silver* as involving "organizations made up of firms, each of which were self-contained competitors separate and independent of their membership in the umbrella cooperative," unlike the NFL's member clubs. *NFL Brief* at 22. This is not, in the court's view, a "distinction of substance" as the NFL believes. *Id.* at 23. As discussed below, any individual NFL team could, in theory, withdraw from the NFL and join or found a new league. A team could even withdraw and try to present non-league exhibition games, as the Harlem Globetrotters do. Such a venture might be almost certain to fail—but then so would a stock broker who decided to quit the New York Stock Exchange and operate without a seat on any exchange.

order to produce football games. It does not show that each club can produce football games only as an *NFL* member. Indeed, many of the current NFL members—including plaintiff Raiders—previously operated as members of a rival football league. There is no conceptual reason why any NFL team could not decide to pull out and join a new league.[5] Thus, although the Raiders can create a product only in collaboration with other teams, it does not follow that they "have no capacity to be competitors separate and apart from their membership in the National Football League." *NFL Brief* at 29. Indeed, sports fans quite often wish to spend their money on the games of a particular team, not simply on "NFL football," "NBA basketball," or the like.[6]

Besides stressing its allegedly unitary product, the NFL relies principally on *North American Soccer League* v. *NFL*, 505 F.Supp. 659 (S.D.N.Y.1980), and *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974). But these cases do not help the League in this lawsuit, for they arose in far different contexts. The *North American Soccer League* case arose in the very different setting of a clash between two separate professional sports leagues, and Judge Haight specifically noted that the single entity defense "fails where two member teams would compete in the

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[5] The NFL might insist that although an individual club could secede from the League and continue to take part in producing football games, it would not be producing *NFL football*. But that is a mere tautology and in no way shows that the League's product has a special unitary quality. Even that most blatant coalition of competing enterprises, charged with a Sherman Act violation, could argue that no other entity except the coalition itself could produce a "coalition product": this would not mean that every such coalition must be considered a single business entity.

[6] For this reason, the NFL's analogy with *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir.1976), is unconvincing. *NFL Brief* at 19-20. That case involved a retailer, Hempfield, who operated the grocery departments of a number of defendant's K-Mart stores. The court found an absence of competition, since from a customer's viewpoint, "whether the . . . item was purchased from Kresge or from Hempfield, it was as if the item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment." 544 F.2d at 1193. In our case, by contrast, few football fans would regard a Raiders game and, say, a Jets game as merely "NFL football" dispensed at different locations.

same geographical area for sports' fans dollars, and league restraint of that competition damages a stadium operator"—the precise situation alleged here. 505 F.Supp. at 677, *San Francisco Seals* turned on a finding that denial of the Seals's proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory.

For the foregoing reasons, the court concludes that the NFL's member teams should be treated as separate business enterprises for purposes of this lawsuit, rather than as components of a single business entity. The NFL's arguments are by no means without force if marshalled in an attempt to demonstrate that the competitive activity of the NFL's teams presupposes a degree of mutual cooperation perhaps unique to the world of professional sports. But such unique features are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.

THEREFORE, IT IS ORDERED that the motions of the Coliseum Commission and the Raiders for directed verdict on the single entity issue be granted, and the NFL's motion be denied.

The Clerk of the Court is directed to serve copies of this order by United States mail upon the attorneys of record appearing for the parties herein.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,
vs.
NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,
vs.
NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.
Intervenor.

ORDER DENYING MOTION FOR CHANGE OF VENUE

This matter is before the court on the National Football League's motion for change of venue. Having considered the pleadings, the affidavits, the memoranda of law, and the oral argument of counsel, the court has concluded that the motion for change of venue should be denied.

The NFL's motion, based on 28 U.S.C. § 1404(a), seeks to transfer the case out of the Central District of California. The NFL argues that its due process rights to a fair trial would be denied by holding a trial in Los Angeles, where, the NFL argues, a jury would likely be predisposed to favor the transfer of a second NFL franchise to the Los Angeles Coliseum. The NFL further claims that a transfer is necessary to avoid the risk of a verdict based on juror prejudice, financial interest, and the influence of pretrial

publicity. The defendant Los Angeles Rams join in the NFL's motion. Before evaluating the factors to be considered in ruling on a motion under section 1404(a), a brief review of the history of this case and some of the issues involved may be in order.

I. BACKGROUND

The Los Angeles Coliseum Commission originally filed its complaint against the NFL on September 13, 1978. The complaint sought to have sections 3.1 and 4.3 of the NFL Constitution and Bylaws, which required a unanimous vote of all NFL teams to permit a transfer of a team's home location, declared invalid as a restraint of trade violative of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In an order filed February 28, 1979, this court dismissed the complaint with leave to amend on the ground that plaintiff had not adequately alleged standing to bring the action. *Los Angeles Memorial Coliseum Commission v. N.F.L.* ("Coliseum I"), 468 F.Supp. 154 (C.D.Cal. 1979). Plaintiff filed a second amended complaint for injunctive relief on March 5, 1979.

The next major event in the case occurred on January 18, 1980, when plaintiff filed a motion for a preliminary injunction against the NFL. The court was told that the Oakland Raiders Football Club had agreed to move its home location to the L.A. Coliseum but that an injunction was necessary to prevent the NFL from blocking the move by requiring, under its newly amended transfer rule, the approval of three-quarters of the NFL members. After a hearing held on February 4, 1980, and the filing of several supplemental briefs, this court granted a preliminary injunction against the NFL in an order filed on February 21, 1980. *Los Angeles Memorial Coliseum Commission v. N.F.L.* ("Coliseum II"), 484 F.Supp. 1274 (C.D.Cal. 1980). The Ninth Circuit subsequently stayed the order pending appeal, and later reversed, in an opinion filed December 12,

1980, for lack of a showing of irreparable injury. *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 634 F.2d 1197 (9th Cir. 1980).

In the meantime, the L.A. Coliseum Commission filed a third amended and supplemental complaint adding a damage claim to their claim for injunctive relief. Shortly thereafter, the defendant Oakland Raiders filed a cross claim against the NFL for damages and an injunction. Although the L.A. Coliseum's jury trial demand was included in its third supplemental complaint, filed on March 7, 1980, the Coliseum subsequently indicated a desire to try the case without a jury.[1] The NFL, however, has demanded its right to a trial by jury.

Trial was originally scheduled for November 18, 1980.[2] The NFL's motion for change of venue was filed on September 8, 1980. The motion was taken under submission after oral argument on September 30th. Intensive settlement discussions were held on numerous occasions from October 1980 until February 4, 1981. The Oakland-Alameda County Coliseum was permitted to intervene in the suit by an order filed on January 16, 1981. Supplemental memoranda on the motion for change of venue were received on January 14, January 23, January 29, February 4, February 20, February 24, March 6, and March 12, 1981. Discovery having been substantially completed, several motions for partial summary judgment were filed. Remaining at issue are the following basic claims: (1) the claims of the L.A. Coliseum and the Oakland Raiders that the NFL's three-quarters vote requirement for approval of

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[1]On February 2, 1981, the L.A. Coliseum filed a motion under Fed.R.Civ.P. 42(b) for a separate, non-jury trial of its equitable claims, to be held before the jury trial on the Oakland Raiders' cross claims. An order denying the motion was filed after a hearing on February 24, 1981. A copy of that order is attached as Appendix I.

[2]Pursuant to an October 30, 1980 agreement of counsel, the trial date was continued to February 9, 1981. This date was subsequently rescheduled for March 23, 1981.

transfers is both a restraint on trade and an attempt to monopolize, in violation of sections 1 & 2 of the Sherman Act; (2) the L.A. Coliseum's claim for tortious interference with contractual advantage and business relations; and (3) the Oakland Raiders' claim that the NFL's conduct in blocking the Raiders' move to Los Angeles is a breach of the duty of fair dealing. The NFL has responded with the following basic defenses: (1) since the NFL acts as a "single economic entity" in deciding where NFL football will be marketed, the "multiple actors" requirement for a section 1 violation has not been met; (2) blocking the move of the Oakland Raiders to Los Angeles has no substantial effect on competition; (3) the NFL's rule on transfers is valid under the rule of reason and was reasonably applied; (4) the proposed contract between the L.A. Coliseum and the Oakland Raiders would not have received the necessary approval of the appropriate governmental bodies; and (5) the Oakland Raiders Club is precluded from recovering any damages, based on the invalidity of the transfer rule, because of the club's adoption of the bylaws containing the rule and its failure to exhaust intra-league remedies. Trial is scheduled to begin on March 23, 1981.

II. FACTORS TO BE CONSIDERED UNDER SECTION 1404(a)

The statute on which the motion for transfer is based, 28 U.S.C.§ 1404(a), reads as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In ruling on a transfer motion, a district court must consider each of the issues listed in section 1404(a): (1) the convenience of parties; (2) the convenience of witnesses; and (3) the interests of justice. *Kasey v. Molybdenum*

Corp., 408 F.2d 16, 20 (9th Cir. 1969). Moreover, since section 1404(a) was "designed as an attempt to statutorily embody and modify the doctrine of forum non conveniens," *A.J. Industries, Inc. v. United States District Court*, 503 F.2d 384, 386 (9th Cir. 1974), the factors weighed by courts under the old common law doctrine of *forum non conveniens* should also be considered. This remains true even though the court's discretion under section 1404(a) is broader than it was under the doctrine of forum non conveniens. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Some of those factors, discussed by the Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508-09 (1974), are as follows:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . relative advantages and obstacles to fair trial.

The basic factors to be considered then, in determining whether, on balance, a transfer to a different forum would allow a case to proceed more conveniently and better serve the interests of justice, are: (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; and (4) the interests of justice.

A. *Plaintiff's Choice of Forum*

The burden of establishing that an action should be transferred is on the moving party. 1 *Moore's Federal Practice* ¶ 0.145[5], at 1615 (2d ed. 1980); 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3848, at 244 (1976); *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978),

cert. denied, 440 U.S. 908 (1979). It has also been stated that the plaintiff's choice of venue should not be lightly disturbed. 1 *Moore's Federal Practice, supra* ¶ 0.145[5], at 1616; *Northern Acceptance Trust 1065 v. Gray,* 423 F.2d 653, 654 (9th Cir.), *cert. denied,* 398 U.S. 939 (1970). This is particularly so when the forum chosen is not only the plaintiff's domicile but also has a significant connection with the subject matter of the case. *See, e.g., Pacific Car and Foundry Co. v. Pence,* 403 F.2d 949, 954 (9th Cir. 1968); *American Can Co. v. Crown Cork & Seal Co.,* 433 F.Supp. 333, 338 (E.D.Wis. 1977); *Mayer v. Development Corp.,* 396 F.Supp. 917, 932 n.26 (D.Del. 1975). Moreover, the defendant's burden on a transfer motion is said to be especially heavy in antitrust suits, where plaintiff's choice of forum is entitled to particular respect. *See Ford Motor Co. v. Ryan,* 182 F.2d 329 (2d Cir.), *cert. denied,* 340 U.S. 851 (1950); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority,* 442 F.Supp. 1201 (S.D.N.Y. 1978).

The plaintiff Los Angeles Coliseum Commission has its headquarters or "domicile" in Los Angeles. Its suit was prompted by the departure of the Los Angeles Rams from the Los Angeles Coliseum and the Coliseum's subsequent inability, allegedly due to the NFL's rule on transfers, to find a replacement NFL tenant. The NFL meeting at which the league formally voted not to approve a transfer of the Oakland Raiders to Los Angeles was held within the Central District. Plaintiff thus claims that this district is where "the defendant . . . committed violations of the Act and inflicted the forbidden injuries." *Pacific Car and Foundry Co.,* 403 F.2d at 954, *quoting, United States v. National City Lines,* 334 U.S. 573, 583 (1948). *See also Commodity Futures Trading Comm'n v. Savage,* 611 F.2d at 278-79. Moreover, one of the NFL's defenses is that the Coliseum's proposed agreement with the Raiders would not have received the approval of the appropriate Los Angeles City and County officials. The NFL also challenges plaintiff's

argument that the addition of another NFL team in the Los Angeles area would have a significant effect on local competition for players, coaches, and fans. The Central District thus has a significant connection with the subject matter of the case, and plaintiff's choice of this forum is entitled to considerable weight.

As the "Background" section indicated, the motion for change of venue was filed two years after the filing of the original complaint, and six months after the Coliseum first demanded a jury. Although section 1404(a) sets no limit on the time at which a transfer motion may be made, the passage of time is a factor to be considered. *Adler v. McKee,* 92 F.Supp. 613 (S.D.N.Y. 1950). Delays of five months have induced courts to refuse transfers that might otherwise have been granted. *See McGraw-Edison Co. v. Van Pelt,* 350 F.2d 361, 364 (8th Cir. 1965) (en banc); *Metropolitan Life Ins. Co. v. Potter Bank and Trust Co.,* 135 F.Supp. 645 (W.D.Pa. 1955). *See also Securities & Exchange Comm'n v. Savoy Industries, Inc.,* 587 F.2d 1149, 1156 (D.C.Cir. 1978), *cert. denied,* 440 U.S. 913 (1979); *Henry v. First Nat'l Bank,* 50 F.R.D. 251 (N.D.Miss.), *vacated on other grounds,* 444 F.2d 1300 (5th Cir. 1971), *cert. denied,* 405 U.S. 1019 (1970) (transfer motion, filed three months after the filing of the original complaint, was denied because several motions and preliminary injunction had already been decided).

Finally, the NFL has not requested transfer to any specific district, but has merely suggested several possible alternative locations, e.g., Las Vegas, Phoenix, Sacramento, and Portland. The arguments with respect to transfer have therefore been made in the abstract—the NFL claiming, in essence, that any forum would be better than Los Angeles. The fact that the plaintiff's choice of forum is its home district, however, has been considered sufficient to defeat a motion for transfer, absent concrete indications as to why another *particular* forum was better. *Industrial Solvents Corp. v. Towboat Valley Voyager,* 388 F.Supp. 1055, 1057 (S.D.N.Y. 1975).

B. *Convenience of the Parties*

The present forum serves the convenience of the parties because the plaintiff, the defendant Rams, most of the attorneys, and many of the witnesses are located here. Moreover, the litigation has proceeded in this court for over two years. *See, e.g., Commodity Futures Trading Comm'n,* 611 F.2d at 279 ("The district court was familiar with the case and transfer may have led to delay."); *Securities & Exchange Comm'n v. Savoy Industries, Inc.,* 587 F.2d at 1156 ("'[R]elative docket congestion and potential speed of resolution is an appropriate factor to be considered.' . . . [N]ot only would delay from a crowded docket be present, but also the delay associated with the [transferee] district court's having to prepare itself for this complicated case.").

The NFL has not shown that the present forum is inconvenient for it. Indeed, counsel for both the NFL and the Rams are located here. Therefore, the cost to the NFL, the Rams, and Plaintiff of having to transport their counsel to, and house them in, another district, for what the NFL estimates will be a three to five month trial, would no doubt be considerable. *See Altman v. Deramus,* 342 F.Supp. 72, 76 (S.D.N.Y. 1972); *Mobil Oil Corp. v. W. R. Grace & Co.,* 334 F.Supp. 117, 124 n.5 (S.D.Tex. 1971) ("The cost of counsel's transportation and time in route must be borne by the parties. Therefore this factor directly bears upon the convenience of the parties and costs of litigation."). Thus, unlike the usual transfer motion, where the court is asked to balance an increase in costs for one party against a significant decrease in the costs of another, the transfer requested here would result in greatly increased costs for every party to the suit. The convenience of the parties is therefore another factor weighing against transfer of this action under section 1404(a).

C. *Convenience of Witnesses*

The convenience of witnesses is said to be the most important factor in passing on a transfer motion. *Saminsky v. Occidental Petroleum Corp.*, 373 F.Supp. 257, 259 (S.D. N.Y. 1974); 15 Wright, Miller & Cooper, *supra*, § 3851, at 264 ("If the forum chosen by plaintiff will be most convenient for the witnesses, this is a powerful argument against transfer.").

In assessing the effect of a transfer on the convenience of witnesses, courts consider the effect of a transfer on the availability of certain witnesses, and their live testimony, at trial. *E.g., B.J. McAdams, Inc. v. Boggs,* 426 F.Supp. 1091, 1104-05 (E.D.Pa. 1977); *Commercial Solvents Corp. v. Liberty Mutual Ins.*, 371 F.Supp. 247 (S.D.N.Y. 1974); *Polaroid Corp. v. Casselman,* 213 F.Supp. 379, 382 (S.D. N.Y. 1962) ("Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility.").

Witnesses may not be compelled to attend trial unless they can be served with subpoenas within the trial district, or at any place outside of the district that is within 100 miles of the place of trial. Fed.R.Civ.P. 45(e). Thus, transfer may be denied when witnesses either live in the forum district or are within the 100-mile reach of the subpoena power. 15 Wright, Miller & Cooper, *supra* at 267-68; *B.J. McAdams, Inc. v. Boggs, supra* (transfer refused where plaintiff asserted that compulsory process might be necessary to secure the live testimony of witnesses who could not be compelled to testify in the proposed transferee district); *U.S. Industries, Inc. v. Procter & Gamble Co.*, 348 F.Supp. 1265 (S.D.N.Y. 1972).

Plaintiff claims that many of its witnesses will be beyond the court's subpoena power if transfer is granted. Among the witnesses, whose names and testimony plaintiff has specified, are members of the Los Angeles County Board of

Supervisors, representatives of other Coliseum tenants, and the owners of the Los Angeles Rams and the San Diego Chargers. The last two names, those of the Rams and Chargers owners, are also contained in the NFL's tentative witness list, filed January 14, 1981. The NFL, on the other hand, has not indicated that a transfer is necessary for the convenience of any of its witnesses. The factor of convenience of witnesses therefore provides additional support for denial of the requested transfer.

D. *Interest of Justice*

Many considerations have been evaluated by courts under the heading "the interest of Justice." One such consideration is whether a speedier trial may be had in one court than another. Transfer has been denied where, as here, a speedier trial could be had where suit was brought than in the proposed transferee court. *E.g., National Super Spuds, Inc. v. New York Mercantile Exchange,* 425 F.Supp. 665 (S.D.N.Y. 1977); *In re Fenwick Island, Inc.,* 330 F.Supp. 1191 (E.D.N.C. 1971); *Vandusen v. J.C. Penney Co.,* 207 F.Supp. 529, 536 (W.D.Ark. 1962).

The most important "interest of justice" consideration before the court in this case is the defendants' claim that transfer is necessary to avoid the risk of an unfair trial. As part of this claim, defendants argue that jurors in the Central District have been exposed to excessive and adverse pretrial publicity. Defendants also argue that jurors in the Central District would screen evidence "through a filter of local financial and political interests, including the real or perceived financial impact of the Raiders' arrival in Los Angeles and the effect of a second NFL franchise on the area's spiritual and economic well-being." These two proposed bases for a transfer—pretrial publicity and juror bias—will be discussed in turn. First, however, it may be helpful to have in mind some background information on the nature of this judicial district.

1. *Background*

The Central District of California comprises the counties of Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura. 28 U.S.C. § 84. Although the Los Angeles Coliseum is located in Los Angeles County, the Big "A" Stadium, in which the defendant Los Angeles Rams play, is located in the City of Anaheim in Orange County. The combined population of these seven counties is approximately 10 million. Excluding Orange and Los Angeles counties, the combined population of the Central District's five other counties is approximately three million. Residents of the Central District engage in many forms of recreation, from hiking and skiing to surfing and spectator sports. Some are fans of local college or nonprofessional teams, while others may root for a variety of professional teams, including the Los Angeles Dodgers, the California Angels, the Los Angeles Lakers, the Los Angeles Kings, and the Los Angeles Aztecs. Still others are probably wholly oblivious to team sports. Such persons may turn for entertainment to the symphony, a wide variety of music and night clubs, visiting ballets and operas, community theater, church groups, films, or, perhaps even gardening or reading. Thus, the population of the Central District is highly diverse, and its residents are far from homogeneous in their interests and backgrounds.

2. *Pretrial Publicity*

Both the NFL and the defendant Rams argue that it will be impossible for them to receive a fair trial in Los Angeles due to "prolonged, extensive, and highly prejudicial" pretrial publicity. In affidavits supporting and opposing the transfer motion, the parties have filed copies of hundreds of articles on various aspects of the case which have appeared in numerous newspapers over the course of a year. According to the affidavits, radio and television stations have also given extensive coverage to this litiga-

tion. Defendants focus particular attention on articles published by a local newspaper which, although it has a relatively small circulation, is alleged to be particularly biased against the defendants. *See Los Angeles Coliseum Commission v. NFL*, ... F.Supp. ....., No. 78-3523-HP (C.D.Cal., filed Jan. 5, 1981) (memorandum and order granting motions to quash subpoenas served on two *Herald Examiner* reporters). While defendants claim that local media coverage "has consisted in large part of vitriolic attacks on the league, its personnel and its membership," many of the articles filed with this court appear to contain straightforward and neutral reports on the progress of this litigation. Other articles are sharply critical of the Raiders' management and express doubts about the legality or fairness of certain aspects of the Raiders' proposed agreement with Los Angeles Coliseum. Although the affidavits support the defendants' claim that "[e]very major courtroom event has been reported by the local press," this fact alone does not justify transfer of the case. Moreover, it should be kept in mind that jurors in the Central District hail from Orange County and five other counties besides Los Angeles, and that the defendant Rams have asserted, in a motion to exclude certain evidence from trial, that "It is certain . . . that wherever the action is tried, intense press coverage will continue."

Defendants argue that the pretrial publicity in this district requires the court to grant a transfer, as a matter of due process, even before the court has an opportunity to determine the effect of this publicity in the context of voir dire proceedings. Numerous cases are cited which purportedly support this proposition. On careful reading of these precedents, however, the court concludes that defendants' pretrial publicity argument is based on two types of authority: (1) dicta from cases having nothing to do with either transfers of venue or pretrial publicity, and (2) standards evolved in criminal cases in which

extreme and virulent pretrial publicity was found to be coupled with demonstrated effects on prospective jurors.

Citations which fall into the first category include the following Supreme Court cases: *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1 (1976); *Matthews v. Eldridge,* 424 U.S. 319 (1976); and *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Greenholtz v. Nebraska Penal Inmates,* the Court rejected a due process challenge to prison parole procedures. *Matthews v. Eldridge* held that states were not required to provide an evidentiary hearing prior to the termination of social security benefits. Finally, in *Goldberg v. Kelly,* cited for the proposition that "factfinding based on assertions of fact contained in extra-judicial sources, or upon political, social or financial persuasions occurring outside the record is erroneous factfinding," the Court held that New York City procedures for termination of public assistance payments to welfare recipients did not meet the requirements of procedural due process. Those procedures, among other things, failed to permit welfare recipients to appear personally before the officials charged with making the final decision on the recipients' continued eligibility.

Other cases falling into the first category include *In re Japanese Electronics Products Antitrust Litigation,* 631 F.2d 1069 (3d Cir. 1980); *United States v. Allsup,* 566 F.2d 68 (9th Cir. 1977); *Kiernan v. Van Schaik,* 347 F.2d 775 (3d Cir. 1965); and *In re Union Leader Corp.,* 292 F.2d 381 (1st Cir. 1961). In *In re Japanese Electronics Products,* the Third Circuit held that the Seventh Amendment does not guarantee a right to a trial by jury when a lawsuit is so complex that the jury would not be able to perform its task of rational decision making with a reasonable understanding of the evidence and relevant legal rules. *United States v. Alsup* was a bank robbery case in which the court refused to excuse for cause two prospective jurors who worked for the bank that had been robbed. This and other

cumulative errors were held to have resulted in a denial of the defendant's right to a fair trial. *Kiernan v. Van Schaik,* cited for the proposition that "it is well settled that *any* extraneous influences that threaten to deprive a civil litigant of an impartial jury are grounds for transfer," held that the trial court abused its discretion in refusing to seek voir dire questions about prospective jurors' relationships with insurance companies. Finally, in *In re Union Leader Corp.,* cited for the proposition that "the right to be tried before an unbiased [trier of fact] is . . . basic to our judicial system," the First Circuit *denied* a petition for a writ of mandamus which sought to transfer a case away from a trial judge who had been personally attacked in many newspaper editorials published by the defendant.

Defendants' second category of authorities, in which extreme and virulent publicity was found to be coupled with demonstrated effects on potential jurors, are highly distinguishable from the instant case. For example, defendants cite five Supreme Court cases: *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965); *Rideau v. State of Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961); and *Marshall v. United States,* 360 U.S. 310 (1959).

In *Sheppard v. Maxwell,* 384 U.S. 333 (1966), massive and outrageous publicity, both before and during trial, was coupled with the refusal of the trial judge either to question the jurors on whether they had heard certain highly prejudicial mid-trial broadcasts or to admonish the jury to ignore press accounts of the case. The defendant in the case was a doctor accused of murdering his wife. Prior to his indictment for murder, headlines, editorials, and cartoons asked rhetorically why the doctor was not already in jail. A continuous stream of articles purported to contain statements of the defendant and details of his alleged extramarital love affairs with numerous women. The trial began

just two weeks before the November general election, in which the chief prosecutor was a candidate for judge and the trial judge was up for re-election. Newspapers published the names and addresses of prospective jurors, who reported receiving numerous phone calls regarding the case. Nearly all the seats in the courtroom were assigned to reporters, whose photographs of the jurors were printed constantly in newspapers during the trial. Every juror stated at voir dire that they had read and heard about the case. The jury's visit to the scene of the alleged crime became a full-scale media event. Moreover, in addition to the judge's refusal to order the jury not to read press accounts of the trial, jurors were allowed to place phone calls during deliberations. On the one occasion the judge questioned the jury regarding publicity during the trial, two jurors admitted having heard the highly inflammatory charge that a prison inmate claimed the defendant was the father of her illegitimate child. According to the Supreme Court, "the judge never considered . . . means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influences." 384 U.S. at 358. The Court mentioned several ways of insulating jurors, such as regulating the conduct of journalists in the courtroom, insulating witnesses from interviews with reporters, controlling leaks of information by the prosecution, and proscribing extrajudicial statements by counsel and witnesses on certain prejudicial matters. The Court concluded that, despite the massive and highly prejudicial local publicity, "these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . ." *Id.*

In *Estes v. Texas,* 381 U.S. 532 (1965), the Court was concerned with the impact of live TV and radio coverage of courtroom proceedings on the defendant's due process right to a fair and impartial trial. *Estes v. Texas* was therefore *not* a pretrial publicity case. Justice Clark's "majority"

opinion[3] reasoned that live TV cameras had a tendency to distract jurors, pressure witnesses, place extra burdens on the judge, transgress the dignity of the defendant, and interfere with his ability to concentrate. The Court has since characterized *Estes* as a trial lacking due process since "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth. *Nebraska Free Press Ass'n. v. Stuart*, 427 U.S. 539, 552 (1975), Moreover, the Court in *Chandler v. Florida*, 101 S.Ct. 802 (1981), recently declined to construe *Estes* as laying down a per se constitutional rule barring live broadcast coverage under all circumstances.

In *Rideau v. State of Louisiana*, 373 U.S. 723 (1963), the Court held that the trial court's refusal of a request for change of venue was a denial of due process where the defendant's confession had been broadcast over TV throughout the district. The confession had been obtained by law enforcement officers who interviewed the defendant on tape without an attorney present. The Court also noted that two jurors were deputy sheriffs, who had been kept on the panel over defense counsel's objections.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court held that a trial which resulted in a conviction and death sentence violated the defendant's due process rights when two-thirds of the members of the jury admitted, before hearing

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[3]Justice Clark's opinion received the concurrences of Chief Justice Warren, and Justices Douglas and Goldberg, who also concurred in a separate concurrence by Chief Justice Warren. Justice Harlan concurred in the result, but indicated that the Court's holding should not be read to extend beyond the facts of the case, as he was not yet prepared to resolve the question addressed in the other concurrences as to whether all live TV coverage was inherently prejudicial. 381 U.S. at 587-96. Four other justices dissented in three separate opinions.

any testimony, their belief that the defendant was guilty. Police press releases publicized the defendant's confession to six murders. A barrage of headlines, articles, cartoons, and pictures continued for six or seven months preceding the trial. A change of venue to an adjoining county, which relied on the same news sources as the transferor district, was granted, but a second motion for change of venue was denied on the basis that state law only permitted one change of venue. Motions for a continuance were also denied. Radio and TV revealed the defendant's 20-year-old conviction for arson, a prior conviction for burglary, and a court-martial on AWOL charges during the war. The press also reported the defendant's offer to plead guilty if promised a 99-year sentence, the determination of the prosecutor to secure the death penalty, and the defendant's purported confession to 24 burglaries. Other highly emotional press stories suggested a "pattern of deep and bitter projudice" in the community, a pattern which was clearly reflected in the voir dire record.

Out of a panel of 430 potential jurors, almost 90% entertained an opinion as to guilt, ranging from mere suspicion to absolute certainty. And eight out of the twelve final jurors stated they thought the defendant was guilty. The facts in *Irwin v. Dowd* are thus quite obviously different from those presented by the instant motion. Nonetheless, the following statement from that opinion, which has been quoted in many opinions since, does have some bearing on the pretrial publicity claims of the defendants here:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scracely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 722-23 (citations omitted.[4] Finally, in *Marshall v. United States,* 360 U.S. 310 (1959), jurors read, during the trial, newspaper accounts of the defendant's prior convictions for activities very similar to those for which he was on trial. This evidence had not been admitted at trial, and the Supreme Court ordered that a new trial be granted.

Thus, an analysis of the Supreme Court cases cited by defendants reveals that they involved not only massive pretrial publicity but also flagrant media intrusions during trial. The Court found that jurors had not been properly insulated from these intrusions. Moreover, all five of the cases involved criminal defendants, and in all but *Estes v. Texas,* the prejudicial effects of massive and virulent publicity on prospective and actual jurors was demonstrated.

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[4]*See also United States v. Ferreboeuf,* 632 F.2d 832, 835 (9th Cir. 1980) ("Ferreboeuf was not entitled to a jury composed only of persons who had no prior knowledge of her case."); *United States v. Lamb,* 575 F.2d 1310, 1315 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978) ("[S]imply because a prospective juror admits having read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror."); *Calley v. Callaway,* 519 F.2d 184, 205 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976) ("[N]o court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live."); 2 *The Unabridged Mark Twain: Roughing It* 740-42 (Running Press 1979)

More recent Supreme Court cases not cited by defendants are also instructive. In *Murphy v. Florida*, 421 U.S. 794 (1975), the issue was whether petitioner was denied a fair trial because members of the jury learned from news accounts about the defendant's prior felony conviction and aspects of the crime with which he was charged. In finding no due process violation, the Court referred to *Irvin v. Dowd*, *Rideau v. Louisiana*, *Estes v. Texas*, and *Sheppard v. Maxwell* as cases in which convictions had been obtained in a "trial atmosphere that had been utterly corrupted by press coverage." 421 U.S. at 798. The Court further distinguished those cases as follows:

> The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Moreover, the court noted that the voir dire record indicated "no . . . hostility to petitioner by the jurors who served in his trial." Similarly, in *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court affirmed the conviction of a man whose trial on charges of torturing, abusing, and murdering children was accompanied by extensive pretrial publicity. The Court cited the *Irvin v. Dowd* quotation set out above, and noted that "the trial judge did everything possible to insure an impartial trial for the defendant," including a careful and extensive examination of prospective jurors. 432 U.S. at 302.

Although these cases indicate that the Court will look to the voir dire record to determine whether, as a result of pretrial publicity, potential jurors are prejudiced against

a party in the case, the defendants cite the following five district court cases for the proposition that the "pervasive pretrial publicity" in this case "dispenses with the need for, or utility of voir dire": *United States v. Marcello,* 280 F.Supp. 510 (E.D.La. 1968); *United States v. Parr,* 17 F.R.D. 512 (S.D.Tex. 1955); *Haase v. Gilboy,* 246 F.Supp. 594 (E.D.Wis. 1965); *United States v. Rossiter,* 25 F.R.D. 258 (D.P.R. 1960); and *United States v. Florio,* 13 F.R.D. 296 (S.D.N.Y. 1952). The first two of these cases involve communities which could be fairly described as "utterly corrupted by press coverage." The remaining cases, however, do not support the proposition for which they are cited. Moreover, defendants neglect either to cite or distinguish numerous other cases, particularly those in this circuit, that indicate that the proper occasion for determining whether a fair and impartial jury can be chosen is during voir dire.

In *United States v. Marcello,* 280 F.Supp. 510 (E.D.La. 1968), the defendant's motion for a change of venue from the Eastern District of Louisiana to the Southern District of Texas was granted. Shortly thereafter, however, the defendant moved the court to reconsider its grant of the requested transfer. According to the court, "[t]he only plausible motive supporting such bizarre conduct is that the defendant is now merely seeking to prepare a record for appeal in the event that he is convicted." 280 F.Supp. at 522. The court therefore refused to reconsider the order transferring the case to the Southern District of Texas. The court noted that the defendant had attracted "nefarious publicity" for many years in the transferor district as a "leader of the Cosa Nostra or Mafia in Louisiana." *Id.* at 516. Moreover, a photo showing the basis for the defendant's indictment on assault charges—the defendant

striking an FBI agent at an airport—was published conspicuously in local papers, along with stories about the desire of the governor of Louisiana to "get rid of Marcello." *Id.* at 517. For these reasons, the court stated it was "definitely of the opinion that the publicity which the defendant has received has been so highly pervasive in this area [i.e., the Eastern District of Louisiana] that it would prevent the defendant from receiving a fair and impartial trial in this state." *Id.*

In *United States v. Parr,* 17 F.R.D. 512 (S.D.Tex. 1955), the court, on the basis of newspaper clippings and affidavits, made a pre-voir dire finding that, since the defendant had been the subject of so much highly unfavorable publicity (involving a killing and political corruption), his trial for tax fraud should be moved to another district. In another case cited by defendants, however, the court specifically found that the question whether the defendant may be unable to obtain an unbiased jury was "premature." *Haase v. Gilboy,* 246 F.Supp. 594 (E.D.Wis. 1965). The court's grant of the requested transfer was therefore based on the "totality of circumstances," including the convenience of the witnesses and the fact that the case could come to trial earlier in the transferee district.

Similarly, the transfer in *United States v. Rossiter,* 25 F.R.D. 258 (D.P.R. 1960), was based on the ground that both the witnesses and the defendants, who were indigent, lived in the transferee district. Finally, in *United States v. Florio,* 13 F.R.D. 296 (S.D.N.Y. 1952), the last of the defendants' authorities for the proposition that the transfer should precede voir dire, a change of venue was was granted, prior to voir dire, because transfer was favored by both the defendant and the government. Indeed, Judge Kaufman noted in that case, but had no occasion to

rely on, the technique of voir dire "to minimize or exclude the effects of pre-trial publicity . . . ." 13 F.R.D. at 299.[5] Defendants' argument that transfer should be granted before voir dire is thus not only based on inapposite cases but also overlooks substantial authority in this and other circuits supporting the use of voir dire under similar circumstances.

It has long been recognized in this circuit that "[t]he effect of pretrial publicity can be 'better determined after the voir dire examination of the jurors.' " *Narten v. Eyman*, 460 F.2d 184, 187 (9th Cir. 1969). For example, in *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971), Silverthorne's motion for a continuance on the ground that it was necessary to abate the effects of massive adverse publicity was denied by the trial court. The Ninth Circuit held that the denial of this motion was "in the sound discretion of the trial court and a denial of such a motion, prior to the voir dire examination, is not an abuse of that discretion." 400 F.2d at 634. This rule was held to apply to motions for change of venue as well in *Narten v. Eyman, supra.*

In *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), appellants claimed to have been prejudiced by pretrial publicity linking them to

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[5]Two other cases cited elsewhere in defendants' papers may be similarly distinguished. In *Canuel v. Oskoian*, 23 F.R.D. 307 (D.R.I. 1959), the defendant union's motion for change of venue on the basis of pretrial publicity and the existence of ongoing state legislative hearings involving the union's activities was denied. In *Wilson v. Great Atlantic & Pacific Tea Co.*, 156 F.Supp. 767 (W.D.Mo. 1957), the court denied the defendant's motion to transfer a wrongful death action brought by black plaintiffs because the defendant never answered plaintiffs' affidavits asserting that, among prospective jurors in the transferee district, there was a high degree of racial prejudice.

the Mafia. The court quoted the following standard for dealing with pretrial publicity from *Silverthorne v. United States*:

> "[T]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . [W]hen pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered." . . . In a case of *substantial* pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice.

500 F.2d at 879 (citations omitted). On the basis of these standards, the court then found that pretrial publicity had not been substantial enough to have required the trial judge to interrogate prospective jurors about it at length.

In *United States v. McDonald*, 576 F.2d 1350 (9th Cir.), *cert. denied*, 439 U.S. 830, 927 (1978), appellant had sought a change of venue under Fed.R.Crim.Proc. 21(a), which requires a change of venue when there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" in the transferor district. The court stated that "When a Rule 21(a) motion is made 'the ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination.' " 576 F.2d at 1354 (citations omitted). Moreover, the court noted that "[t]he trial judge has 'a large discretion' in gauging the effects of allegedly prejudicial publicity and in taking measures to insure a fair trial." *Id.* The court therefore

held that appellant had not demonstrated that the district court abused its discretion in denying the motion for change of venue.

In *United States v. Giese,* 597 F.2d 1170 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979), the court rejected appellant's argument that the district court had failed to safeguard his right to an impartial jury, uninfluenced by massive prejudicial pretrial publicity. Citing the voir dire standards established in *Silverthorne* and *Polizzi,* the court upheld the trial court's use of the more limited, general questioning technique on the ground that few jurors indicated they were influenced by, or had even seen, coverage of appellants' case in newspapers or on radio and TV. Finally, in *United States v. Ferreboeuf,* 632 F.2d 832, 834 (9th Cir. 1980), the court again quoted the following standard of review established in *United States v. Polizzi*: "Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate." In upholding the voir dire procedures followed by the district court against the appellant's pretrial publicity claim, the court stated that the defendant "was not entitled to a jury composed only of persons who had no prior knowledge of her case." *Id.* at 835.

The practice in this circuit of waiting until voir dire to determine the availability of "fair and impartial jurors" is echoed in the opinions of many other courts. For example, in *United States v. Haldeman,* 559 F.2d 31 (D.C.Cir. 1976), *cert. denied,* 431 U.S. 933 (1977), the court reasoned that

> A judge reviewing pretrial publicity before the *voir dire* would have to attempt to determine from his own reactions how the community would respond to that publicity. . . . After the *voir dire* a judge can determine which description of the publicity's impact is accurate; before the *voir dire* a judge could only gave [sic]

> guessed. . . . Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.

559 F.2d at 62-63 n.37. The court therefore upheld the district court's refusal to grant pre-voir dire requests for a continuance or change of venue, stating that

> if an impartial jury actually cannot be selected, that fact should become evident at the *voir dire*. The defendant will then be entitled to any actions necessary to assure that he receives a fair trial.

Id. at 63. *See also United States v. Lamb,* 575 F.2d 1310, 1315 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978) ("The proper occasion for determining juror partiality is upon voir dire examination."); *United States v. Caldwell,* 543 F.2d 1333, 1342 (D.C.Cir. 1974), *cert. denied,* 423 U.S. 1087 (1967); *United States v. Daddano,* 432 F.2d 1119, 1126 (7th Cir. 1970), *cert. denied,* 402 U.S. 905 (1971); *United States v. Cerilli,* 428 F.Supp. 801, 808 (W.D.Pa. 1977) ("In tune with the current cases of this Circuit and others, it is at least more expedient to wait until a thorough voir dire before a motion to change venue should be entertained.").

Finally, it should be noted that requests for pre-voir dire transfers are often supported by statistical evidence or the results of opinion polls. *See, e.g., United States v. Haldeman,* 559 F.2d at 64 n.43 (appellants presented a statistical analysis of the district's voting patterns and the results of a poll conducted by a public opinion research company); *United States v. Holder,* 399 F.Supp. 220, 228 (D.S.D. 1975) (survey data compiled on the district's high degree of racial prejudice). Since the defendants here have submitted no

such evidence, and since the copies of newspaper articles thus far submitted do not compel a conclusion, prior to voir dire, that six[6] fair and impartial jurors cannot be found in this district, the argument that the Central District is not a "fair and impartial" forum due to pretrial publicity must be rejected at this time. The court will remain open, however, to entertaining whatever motions defendants wish to make upon the conclusion of voir dire proceedings.

In the meantime, the court plans to conduct a thorough voir dire to elicit from individual potential jurors their awareness of prior publicity, and the existence of any disqualifying prejudice.[7] The court will also admonish the

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[6]Local Rule 13.1 of the United States District Court for the Central District of California provides that a jury for the trial of civil cases shall consist of six persons. *See Colgrove v. Battin* 413 U.S. 149 (1973).

[7]In examining jurors on pretrial publicity, the court's questioning may include the following:

> Have any of you read or heard anything about this case or either of the parties before coming into this courtroom? (If the answer is in the affirmative, then the examination of each juror on the effects of pretrial publicity will be conducted outside the presence of the other jurors.)
>
> What information about this case or any of the parties do you have? What was the source of your knowledge? What newspapers or magazines do you regularly read? What television news programs do you regularly view? What radio news programs do you regularly listen to? Have you ever read or heard anything about any of the following: (List specific issues and events submitted by the parties.)
>
> What information do you have on these matters? What was the source of your knowledge? How would your knowledge of the case, the parties, or any of these matters affect your attitude toward the trial and specifically toward the parties and the merits of this case? Do you have any opinion or impression about the merits? Do you have any preconceived notion about the merits of the case? Can you lay aside any preconceived notion or impression or opinion and render a verdict based solely on the evidence and on the court's instructions? Do you

jurors not to read any newspaper or magazine article, or to listen to any radio or television newscast about this case, or any of the parties involved, until they are discharged from further service as jurors in this case.[8] Finally, the court intends to grant all parties the maximum number of peremptory challenges allowable under 28 U.S.C. § 1870.

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understand that what we want is a trial by an impartial jury, that is, by jurors who have no bias or prejudice that would prevent them from returning a verdict according to the law and the evidence? Is that clear to you? Do you believe you are such a juror? Why?

[8]A complete admonition to jurors, to be given at least daily during the trial, might read as follows:

> Ladies and Gentlemen, at this time the court again admonishes you that you are not to discuss this case among yourselves or with anyone else until the case is finally submitted to you. The case will be submitted to you after you have heard all the evidence, the argument of counsel, and the court's instructions on the law that applies to the case.
>
> The court further admonishes you that you are not to read any newspaper or magazine article, or to listen to any radio or television newscast about this case, or any of the parties involved, until you are discharged from further service as jurors in this case.
>
> Now, ladies and gentlemen, you should not feel that you will be inconvenienced as a result of this order, because as a juror you will learn first-hand about this case right here in the courtroom. And I do not impose this order because of any lack of confidence in you. This order is imposed so that no one at any time in the future will be able to say that anything which may have appeared in print, or may have been broadcast on radio or television, during the course of this trial, had any influence on your deliberations or on your determination of the issues in this case.
>
> In addition, if during the course of the trial any publicity concerning this case comes to your attention, you are directed to notify the court of that situation at once in a signed note, which you should deliver to the bailiff.
>
> Another important matter: While the trial is in progress, give everyone connected with this case a wide berth—that includes

3. *Juror Prejudice*

Although defendants claim that potential Central District jurors have "emotional" or "political" biases prejudicial to defendants, there has been no attempt to compile any statistical or survey data to substantiate this claim. Moreover, since the court can easily imagine that many persons in this district have no interest in either professional sports or football, any decision on the extent of alleged "emotional" or "political" biases must await further substantiation in the context of the voir dire. It is necessary to turn then to the only aspect of defendants' bias claim on which there is both concrete evidence and substantial precedent, i.e., the claim that Central District jurors have a financial interest in the outcome of this case.

This claim is based on statements by L.A. Coliseum officials that the failure to secure the Raiders as a principal tenant will result in a deficit to be carried by local taxpayers. To support the argument that such an interest renders a forum inappropriate, the NFL cites a state statute requiring actions brought by a county, city or local agency against non-residents of that county or city to be transferred to a court in a community other than that in which the plaintiff is situated. CAL. CIV. PROC. CODE § 394(1). Since venue in the federal courts is statutory and procedural, however, neither the Rules of Decision Act, 28 U.S.C. § 1652, nor the doctrine of *Erie R.R. v. Tompkins*,

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the attorneys, the witnesses, and the parties. Don't even direct a "good morning" or "good evening" or exchange any sort of greetings with any of them because someone fifty feet away may misinterpret a routine courtesy. It is best that you give everyone connected with this case a very wide berth.

It is very important, ladies and gentlemen, that you strictly adhere to the court's admonitions. Again, keep in mind that you are going to get all the evidence you need to decide this case right here in the courtroom. It would be unfair to the parties and violate our system of justice for you to be subjected to any outside influences.

304 U.S. 64 (1938), applies, and state law cannot control federal venue. *See Miller v. Davis*, 507 F.2d 308, 316-17 (6th Cir. 1974) ("Federal courts should apply *federal* venue rules and need not follow contrary state law."); *Brown v. Pyle*, 310 F.2d 95 (5th Cir. 1962); *Taylor v. Titan Midwest Const. Corp.*, 474 F.Supp. 145 (N.D.Tex. 1979) (contractual venue provision enforced despite state law to the contrary); *R.S. Mikesell Assoc. v. Grand River Dam Authority*, 442 F.Supp. 229 (E.D.Okla. 1977).

In further support of its "financial interest" argument, the NFL cites *Withrow v. Larkin*, 421 U.S. 35 (1975); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Tumey v. Ohio*, 273 U.S. 510 (1927); and *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971). None of these cases, however, supports the proposition that prospective jurors who are taxpayers of a certain municipality should be disqualified from jury service in cases involving that municipality's governmental or quasi-governmental agencies.

The NFL relies on the following dicta in *Withrow v. Larkin*, 421 U.S. at 47:

> various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

This statement, however, was totally unrelated to any issue before the Court. In *Withrow*, the question was whether due process was violated by a state medical examining board which temporarily suspended a doctor's license at a contested hearing on charges evolving from the board's own investigation. The Court held that the district court had abused its discretion in issuing a preliminary injunction against the board since the district court's finding that

the doctor would likely succeed on the merits was clearly wrong. Thus, the Court in *Withrow* was faced neither with a claim that the Board had a financial interest in the outcome, nor that persons with an interest as attenuated as that alleged in this case should be barred from serving on a jury.

Similarly, *Commonwealth Coatings Corp. v Ohio,* 393 U.S. 145 (1968), rather than being a case involving taxpayer jurors, involved an arbitration, under the Federal Arbitration Act, of a dispute between a subcontractor and a prime contractor over money due on a painting job. The Supreme Court held that the subcontractor was entitled to have the arbitration award set aside when no one had disclosed to the subcontractor that the prime contractor was actually a regular customer of the third, and supposedly neutral, member of the arbitration panel.

In *Tumey v. Ohio,* 273 U.S. 510 (1927), the Court found that a municipal ordinance violated due process because it permitted a mayor, who sat as a judge for certain offenses, to collect his costs from the persons he convicted. In response to an issue raised by the municipality, the Court discussed whether a *citizen* of a municipality could sit as a juror where the city is a party or where the city, by receipt of fines, might benefit from a conviction or a ruling in its favor. While noting that such a practice might have been barred under the strict common law rule, the Court stated that "the strict rule seemed to be inconvenient, impracticable, and unnecessary and . . . such remote or minute interest in the litigation might . . . not . . . be a reason for disqualification of a judge or a juror." 273 U.S. at 528.[9]

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[9]The Court also quoted the following passage from *City Council v. Pepper,* 1 Rich. 364, 366 (S.C.):

> The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the mind. It is too slight to excite prejudice against a defendant.

273 U.S. at 530.

Similarly, *Connally v. Georgia*, 429 U.S. 245 (1977), cited by the defendant Rams, found that issuance of a search warrant violated due process where the issuing officer was not salaried, but received a statutory fee only on the *granting* of requested warrants. These cases thus involved statutory schemes by which triers of fact were directly compensated for reaching certain results, i.e., a conviction or a finding of probable cause for a search. In neither was it suggested that taxpayers should be disqualified as triers of fact for remote and unmeasurable interests in the possible effects of their decisions on sources of municipal revenues. Finally, in the last case cited by defendants, *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971), a juror was held to be disqualified because he owned stock in the defendant company.

A financial interest argument similar to that raised by the NFL was rejected in *Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D.Va. 1975). In that case, a Virginia power company had brought an action against a Pennsylvania manufacturer for breach of contract. Noting that the forum district was served exclusively by the plaintiff power company, the defendant manufacturer moved for a change of venue. The defendant argued that all jurors living in the district would have a financial interest in the outcome by virtue of their consumption of electricity sold by the power company, and by the fact that, under Virginia law, the plaintiff would be required to pass along to its customers in rate reductions any substantial verdict it might win against the defendant. The prospective juror interest in the outcome in that case was thus not only district-wide but also more direct and foreseeable than that alleged here. The court denied the motion for transfer, however, on the ground that the defendant's approach was "a novel one. . . . without direct support from any authority [and] [i]f followed it would deny utilities their home venue in all except the most minor of cases."

389 F.Supp. at 571. The court noted that, of all the authorities cited, the one coming closest to answering the question was *Tumey v. Ohio,* discussed above. The court also observed that

> every United States Judge is a citizen of the United States and yet he is not considered disqualified to impose substantial fines payable to the United States. Jurors who are citizens of the Commonwealth of Virginia may impose substantial fines payable to the Commonwealth. . . . The commissioners as free holders of a municipality determine the award in condemnation cases despite the fact that the amount of the award could affect the amount of taxes each might have to pay as a citizen of the municipality. . . . The point seems to be that *even though it is clear there will be a financial impact upon the trier of fact, if that impact is insubstantial or insignificant, the trier of fact is not disqualified.*

Id. (Emphasis added.)

The court's reasoning in *Virginia Elec. Power Co.* is equally applicable here. The NFL's argument that a transfer out of the Central District is necessary on the basis that Los Angeles taxpayers will have a financial interest in the outcome is therefore rejected.

CONCLUSION

The NFL's motion for a change of venue prior to the conduct of voir dire proceedings is hereby denied. Three of the factors to be considered under 28 U.S.C. § 1404(a)—the plaintiff's choice of forum, the convenience of the parties, and the convenience of the witnesses—weigh heavily against a transfer. Defendants have suggested two important "interest of justice" considerations, i.e., pretrial publicity and juror prejudice. The court has concluded, however, that the effects of pretrial publicity and potential juror prejudice can be better determined after the voir dire examination of the jurors. Thus, the court will remain open to entertaining whatever motions defendants wish to make on these subjects at the conclusion of voir dire proceedings.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this action.

Dated: March 17, 1981.

/s/ Harry Pregerson

Harry Pregerson
United States Circuit Judge
Sitting by Designation

APPENDIX I

Minute Order: Ruling on L.A. Coliseum Comm'n's Motion for a Separate, Non-Jury Trial of its Claim for an Injunction.

Date of Hearing: 2/24/81

The cases that control the disposition of this motion are *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959) and *Calnetics Corp. v. Volkswagen,* 532 F.2d 674 (9th Cir. 1976).

In *Ross v. Bernhard* 396 U.S. 531 (1970), the Supreme Court stated the *Beacon Theatres* rule as follows:

> [W]here equitable and legal claims are joined in the *same action,* there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

396 U.S. at 537-38 (emphasis added). *See also Myers v. United States District Court,* 620 F.2d 741, 744 (9th Cir. 1980) ("Even if the contention that Myers' counterclaim is primarily equitable were true, denying Myers a jury trial on his legal counterclaim merely because it was incidental to his equitable claim would directly contradict the principle stated in *Ross v. Bernhard, supra.*"). The legal and equitable issues here are joined in the *same action:* both the plaintiff L.A. Coliseum and the Oakland Raiders Club, a cross-claimant, have claims for both an injunction and treble damages. According to the Supreme Court in *Beacon Theatres:*

> Since the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court, [the court's] *discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.* As this Court said in *Scott v. Neely:* "In

> the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim . . . of a demand for equitable relief in aid of the legal action, or during its pendency." This long-standing principle of equity dictates that *only under the most imperative circumstances,* circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of the legal issues be lost through prior determination of equitable claims.

359 U.S. at 510-11 (citations and footnotes omitted) (emphasis added). The L.A. Coliseum has presented no imperative circumstances that might require this unusual move. *See also* 359 U.S. at 508 n.10 ("Since the issue of violation of the antitrust laws often turns on the reasonableness of a restraint on trade in the light of all the facts . . . it is particularly undesirable to have some of the relevant considerations tried by one factfinder and some by another.").

The L.A. Coliseum has asserted that the Oakland Raiders would be willing to waive the collateral estoppel effect of a determination in favor of the Coliseum on the injunction issue. The Coliseum also argues that, under *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), when two parties bring legal and equitable claims in the same action, the court may try the equitable claims first without violating the defendant's Seventh Amendment rights. *Parklane Hosiery,* however, merely established rules on the offensive use of collateral estoppel. Plaintiffs in a stockholders' class action were permitted to use a determination against the defendants in a prior SEC injunction action as collateral estoppel, partly because the stockholder plaintiffs *could not have easily joined in the prior action.* Here, however, since the Oakland Raiders Club is a necessary party and is already a defendant/cross claimant in the case, *Parklane*

Hosiery is inapplicable. The Ninth Circuit discussed a similar situation in *Calnetics Corp. v. Volkswagen,* 532 F.2d at 690 n.25:

> Calnetics did not offer to waive the collateral estoppel effect of the § 7 equitable determination on remand. But even if it had, we would be inclined to remand for a consolidated trial because of the threat of inconsistent determinations.

Therefore, in light of the foregoing authorities, and bearing in mind the overriding Seventh Amendment right of jury trial considerations discussed in *Beacon Theatres,* the L.A. Coliseum's motion for a separate, non-jury trial of its equitable claims is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7070

DC# 78-3523 HP Central California

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

No. 82-7071

KANSAS CITY CHIEFS, HOUSTON OILERS, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

No. 82-7076

LOS ANGELES RAMS FOOTBALL COMPANY, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

(Continued on following page)

No. 82-7079

OAKLAND-ALAMEDA COUNTY COLISEUM, INC., et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

[Filed March 1, 1982]

Before: HUG, FLETCHER and FARRIS, Circuit Judges

ORDER

The petitioners seek a writ of mandamus commanding the district court to order a change of venue for the trial of this action. Mandamus is a drastic remedy and is invoked only in extraordinary situations. *Bauman v. United States District Court,* 557 F.2d 650 (1977). "Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1975), *quoting Will v. United States,* 389 U.S. 90, 95 (1967). The petitioners have the burden of showing that their right to the issuance of a writ of mandamus is clear and indisputable. *Kerr,* 426 U.S. at 403; *Bauman,* 557 F.2d at 662.

The petitioners do not contend that they are entitled to relief under the statutory provisions of 28 U.S.C. § 1404(a), which provides the general standards for change of venue in civil actions. Rather, petitioners contend that they are entitled to a change of venue under the due process clause of the United States Constitution because it would not be possible to obtain a fair and impartial jury in the Central District Court of California. The district court, after carefully examining the evidence and statistics presented, concluded that the petitioners failed to demonstrate that "the

Central District, which is comprised of seven counties whose combined population numbers approximately twelve million persons will be unable to provide six fair and impartial men and women who can serve as a jury for this trial." The order of the district court further provides that the denial of the motion to change venue is without prejudice to renewal at the close of the jury selection process. This circuit has recognized that the effects of pretrial publicity can be better determined after the voir dire examination of the jurors. *Narten v. Eyman*, 400 F.2d 184, 187 (9th Cir. 1967).

The petitioners have failed to demonstrate that the extraordinary relief of mandamus is warranted.

The petitions are denied.

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Cross-Defendants.

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2).

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have

unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON

UNITED STATES CIRCUIT JUDGE
Sitting by Designation

APPENDIX F

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 82-5572, 82-5573, 82-5574, 82-5664
82-5665, 83-5714, 83-5732, 83-5938

LOS ANGELES MEMORIAL COLISEUM COMMISSION, *et al.*,
Plaintiff/Appellee,

v.

NATIONAL FOOTBALL LEAGUE, etc., *et al.*,
Defendants/Cross-Defendants/Appellants,

v.

OAKLAND RAIDERS, LTD.,
Cross-Claimant/Appellee.

Before:

ANDERSON AND NELSON,
Circuit Judges,

and S. WILLIAMS,
*District Judge**

ORDER

Judges Anderson and Nelson vote to deny panel rehearing. Judge Williams would grant panel rehearing. The panel has voted to reject the suggestion for rehearing *en banc.*

---

* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for *en banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

No. 84-406 (2)
84-418 (3)

Office Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioner,
v.
OAKLAND RAIDERS, LTD., & LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

OAKLAND-ALAMEDA COUNTY COLISEUM COMMISSION, INC.
Petitioner,
v.
OAKLAND RAIDERS, LTD., & LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

On Appeal From The United States Court Of Appeals, For The Ninth Circuit

BRIEF OF PUBLIC ENTITIES AS AMICI CURIAE IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Filed On Behalf of City of San Diego, California; the City of Atlanta and Fulton County Recreation Authority, a public corporation of the State of Georgia; the City of Buffalo, New York; the County of Erie, New York; the County of Alameda, California; the City of Oakland, California; the City of Irving, Texas; the City of New Orleans, Louisiana; the City of Pittsburgh, Pennsylvania; Ramsey County, Minnesota; Tampa Sports Authority, a body corporate and politic of the State of Florida; the City of Green Bay, a Wisconsin municipal corporation; King County, Washington.

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INTEREST OF AMICI CURIAE

Amici represent municipal governments, county governments, public entities and public corporations that own or subsidize sports stadiums which provide public facilities for NFL member clubs and other professional and local sports teams. Pursuant to Rule 36(4), the consent of the parties is not required to file this Brief, since *Amici* are political subdivisions of their states.

The factual history of this litigation may be found in ample detail in Petitioners' briefs and therefore will not be repeated here.

Amici wish to assist the Court in identifying and understanding the relationship between professional sports leagues and the communities in which their teams operate and how that relationship should affect the resolution of the antitrust issues raised in this action.

The antitrust issues presented to this Court are of enormous importance both in an economic and noneconomic sense to public entities and taxpayers across the United States. These issues directly affect the manner in which public authorities may deal with professional sports leagues, the degree to which public authorities may rely upon decisions and commitments of such leagues, and the pertinence of public interest considerations in a Sherman Act analysis of league decisions on the location of existing league teams.

The undisputed reality is that public entities and their taxpayers support professional sports leagues by public subsidy. Huge sports facilities are built by the public with borrowed money to be repaid in part by revenues generated from the continued operations of the sports leagues in the community.

The City of Oakland put itself on the map by its then thought farsighted investment in the business of professional football and by the subsequently unequalled fan support. Obviously, the City of Oakland, along with *Amici*, in making their investment decisions relied and still rely heavily on a sports league's ability to control the location of its teams. Community leaders would be subject to recall were they to promote public investment in barnstorming sports teams. From a business standpoint, the NFL would be foolish to ignore the public's contribution to its success by allowing willy-nilly relocations.

League rules that promote and ensure franchise location stability are critical to the public's decision to make these major investments. Such investment would seldom, if ever, be made in the absence of league rules and commitments that provide a reasonable assurance of continued team operations in a community.

Investment by public entities in community sports and entertainment facilities promotes competition among different sports, as well as among sports and other entertainment. The decisions of the courts below discourage future investment by public authorities in such facilities and put existing investments at serious risk.

In addition to these adverse financial consequences and their concomitant impairment to competition, the courts below failed to give due consideration to the equally important "investment" of community spirit and pride in local sports teams which lies at the heart of the league's commitment to the communities.

Antitrust laws never were intended to frustrate or undermine the public interest or consumer interests. Just the opposite was intended. Nevertheless, as applied and interpreted in the courts below, the antitrust laws have been turned against the public and the consumer in the City of Oakland and adjoining communities. *Amici* fear the same use of the Sherman Act against them.[1]

The courts below were misguided in focusing on the sports competition among the NFL teams that occurs on the football field while overlooking the economic competition among different sports and between sports and other entertainment. In so interpreting the antitrust laws, the courts will render meaningless the NFL's commitments to *Amici* and to other communities that support local teams. The decisions of the courts also will discourage public investment in sports facilities because of the inability to obtain adequate assurance of a continuing relationship between the sports franchises and the communities.

Amici urge the Court to recognize not only the existence of these competitive and public interest considerations, but their clear relevance to an

---

[1] Indeed, the City of Baltimore has already lost the Baltimore Colts and now is involved in protracted, expensive litigation over the legality of that unilateral move made in the wake of the court of appeals' decision in this case.

evaluation of sports league agreements concerning team location under Section 1 of the Sherman Act.

SUMMARY OF ARGUMENT

Amici urge that important questions of federal law are presented in this case and that a proper analysis of these questions will lead this court to conclude:

First, from its precedent, that the NFL's franchise location rule, which promotes competition and investment and protects the public interest, cannot as a matter of law violate Section 1 of the Sherman Act.

Second, assuming the application of Section 1 to such league rules, that public interest factors and the public service aspects of a business are entitled to consideration in a rule of reason analysis of professional sports leagues' location rules.

ARGUMENT

I

THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO THE NFL'S LOCATION RULE PRESENTS IMPORTANT QUESTIONS FOR THIS COURT'S REVIEW

Amici, the City of Oakland, the County of Alameda and other communities relied on league control of franchise locations prior to making huge investments in public facilities. Those communities sought a *league* franchise to bring *league* sports to its citizens. The communities did not deal with the separate member clubs when bringing professional sports to town. The member clubs had no authority to do so -- that was a *league* decision.

The communities recognized the reality ignored by the Ninth Circuit in its misguided antitrust analysis. Professional sports leagues deal in one product -- league play. Only the league can produce that product and bring it to a community. As a matter of law, the league members cannot be treated as independent economic competitors under Section 1 of the

Sherman Act with respect to decisions on the location of league franchises.

In reaching the result below, the lower courts relied heavily on the so-called "intraenterprise conspiracy" cases, which were repudiated by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 81 L.Ed.2d 628, 104 S.Ct. 2731 (June 19, 1984).[2] In applying the intraenterprise conspiracy doctrine to the NFL, the lower courts improperly elevated form over economic substance and distorted antitrust analysis in a manner that served neither consumer interests nor any other policy underlying the antitrust laws.[3]

The courts below gave unnecessary emphasis to the fact that the NFL clubs were "all independently owned." *Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1389-1390. As such, both lower courts viewed the NFL as merely an "association" of 28 "independent business entities" subject to the conspiracy provisions of Section 1 of the Sherman Act. *Id.* at 1388, 1390. In reaching this conclusion, the courts below relied upon decisions that no longer accurately state the law. In *Copperweld*, this Court undertook a detailed analysis of each of the intraenterprise conspiracy cases and disapproved their holdings and reasoning, stating that "[t]o the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 647, 104 S.Ct. at 2745.

---

[2] In its initial holding, the district court relied upon all four principal intraenterprise conspiracy cases: *United States v. Yellow Cab Co.*, 332 U.S. 218, 91 L.Ed. 2010 (1947), *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 95 L.Ed. 219 (1951), *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 95 L.Ed. 1199 (1951), and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 20 L.Ed.2d 982 (1968). *Los Angeles Memorial, etc. v. Nat. Football League*, 519 F.Supp. 581, 582 (C.D. Cal. 1981), *aff'd* 726 F.2d 1381 (9th Cir. 1984). In affirming, the court of appeals both approved the district court's reliance on these cases and specifically cited *Timken* and *Perma Life*. *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 726 F.2d 1381, 1388 (9th Cir. 1984).

[3] Both lower courts also labored under the misapprehension that a holding that the NFL did not violate the antitrust laws in this case would necessarily "make the League incapable of violating Sherman Act § 1" and "immunize the NFL from § 1 scrutiny." *Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1387-1388. *Amici* do not believe either Petitioner to be urging such a position in this Court. Further, as Judge Williams aptly noted, sports leagues will remain subject to the full scope of the antitrust laws if the decisions of the lower courts are reversed. *Id.* at 1409 (dissenting opinion).

In *Copperweld*, this Court recognized that mere organizational structure alone is not sufficient to invoke Section 1 scrutiny, and that separate incorporation may be without antitrust significance and also serve numerous other valid goals. *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 643-647, 104 S.Ct. at 2740-2743. *See also*, Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451 (1983). Antitrust courts are properly concerned with coordinated activity that "suddenly bring[s] together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 642, 104 S.Ct. at 2741. That is not the case here. In the context of a sports league, the coordinated activity "result[s] from an effort to compete [rather than] from an effort to stifle competition." *See, Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 642, 104 S.Ct. at 2741. In a league context, the "coordination" is "necessary if a business enterprise is to compete effectively." *Id.*

Although the court of appeals found that the NFL clubs "are not true competitors" [*Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1391], that they share their revenues extensively [*id.* at 1390], that the NFL has both horizontal and vertical attributes [*id.* at 1391], that "the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose" [*id.* at 1395] and that the location agreement furthers significant league interests [*id.* at 1396], the court nevertheless failed completely to appreciate the significance of those findings. Instead, it took shelter in the intraenterprise conspiracy cases, holding "that existing precedent [cannot] be ignored. . . ." *Id.* at 1390, n. 4. This reliance on a formalistic analysis of cases so recently disapproved by this Court should, without more, warrant review of the decision below.

In *Amici's* view, the proper treatment of a sports league location decision under Section 1 of the Sherman Act is found in *San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974), which posed an equivalent antitrust issue. In that case, the NHL's Board of Governors refused to permit an NHL club to relocate from San Francisco to Vancouver -- an area where no other league team was operating. In holding as a matter of law that the NHL's conduct did not violate the Sherman Act, the court reasoned:

> "Within the relevant market in which we are here concerned, plaintiff and defendants are not competitors in the economic sense. It is of course true that the member

> teams compete among themselves athletically for championship honors, and they may even compete economically, to a greater or lesser degree, in some other market not relevant to our present inquiry. But, they are not competitors in the economic sense in [the market for the production of professional hockey]. They are, in fact, all members of a single unit competing as such with other similar professional leagues. *Consequently, the organizational scheme* of the National Hockey League, by which all its members are bound, *imposes no restraint upon trade or commerce in this relevant market, but rather makes possible a segment of commercial activity which could hardly exist without it.*" *Id.* at 969-70 (emphasis supplied).[4]

League undertakings in connection with stadium construction demonstrate how unrealistic it is to view members of a sports league as business competitors with respect to team location matters. One illustration is the commitment of the NFL not to approve any geographical relocation of a league member for the full 30-year term of a use agreement between that club and a public authority -- a commitment made to satisfy Minnesota state statutory prerequisites for the public construction of a new stadium. *See, Minnesota Vikings Football Club v. Metropolitan Council*, 289 N.W.2d 426, 444 (Minn. 1979). *See also, Lifteau v. Metropolitan Sports Facilities Comm'n*, 270 N.W.2d 749, ____ (Minn. 1979). True business competitors simply do not undertake commitments that directly benefit their competitors by facilitating the construction of the competitors' new operating facilities and assuring their long-term viability.

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[4] A sports law textbook confirms the propriety of this analysis:

> "[T]he realities of the major sports leagues' operations would seem to lend support to the conclusion reached in San Francisco Seals. The primary goal of Section 1 of the Sherman Act is to insure that true economic competitors maintain a healthy distance from one another. The section was not intended to condemn all cooperative efforts in the business world. If a particular group of entrepreneurs are joint investors in a common venture which could not be carried on by any one of them alone, the cooperation which results hardly seems improper. In these instances, it is propr that the 'agreements' in question are viewed as essentially internal marketing decisions." Weistart & Lowell, *The Law of Sports*, § 5.11 at 701 (footnote omitted).

Amici submit that a realistic assessment of the operations of professional sports leagues leads inevitably to the conclusion that a league is not a collection of ordinary business competitors of the same character as the members of a trade association. Teams in a professional sports league have no valid business interest in driving each other out of business or in maximizing their profits at each other's expense or at the expense of communities that have invested in facilities on their behalf. Rather, as Justice Rehnquist observed in speaking of the National Football League itself:

> "The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place. . . . This arrangement . . . is largely a matter of necessity." *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting from denial of certiorari).

II

THE RELEVANCE OF PUBLIC INTEREST FACTORS TO A RULE OF REASON ANALYSIS OF THE LEGALITY OF PROFESSIONAL SPORTS LEAGUE LOCATION AGREEMENTS MERITS REVIEW BY THIS COURT

The decisions below declined to require a recognition that public interest factors and the public service aspects of certain businesses (*e.g.*, professional sports leagues and teams) have public service aspects that require special consideration under antitrust laws. The trial court refused to instruct the jury that it should weigh these public interest considerations when assessing the reasonableness of the location agreement under the antitrust laws. *See, Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787, n. 17, 44 L.Ed.2d 572 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 55 L.Ed.2d 637 (1978); *Boddiker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir.) *cert. denied*, 434 U.S. 825 (1977).

The Court of Appeals' unfortunate interpretation of antitrust doctrine has produced merely one ripple in an ever-widening stream of litigation, which already has had unsettling effects on relations between public authorities and the professional sports industry. A national newspaper recently editorialized about these effects:

> "Cities, expecting to create millions in new income, give their names to teams. Fans give their hearts. Sadly, they sometimes get little in return. An Owner who doesn't get what he wants from a town now can take the franchise to another city, leaving behind an expensive, empty stadium and fans with broken hearts. . . .
>
> "If this business of musical franchises continues without interference from Congress or the courts, it can only damage the health of professional sports. Each time an Owner is able to thumb his nose at a league or at a city, the stability of the sports industry is threatened. And when loving fans, robbed of their team, stop hating, they will stop caring about the game. Then the game will be over." *USA Today*, April ____, 1984 at ____.

Public authorities, like the public generally, have long looked to professional sports leagues for the responsible administration of their business as the NFL, bringing its product to Oakland each Sunday, became part of the community fabric in the sense of economics, civic loyalty and togetherness.

Publicly owned facilities for the presentation of professional sports league games are commonplace throughout the United States. The construction, financing and operation of these publicly owned stadiums has long been viewed as a proper governmental function. *See, Martin v. Philadelphia*, 420 Pa. 14, 18-19, 215 A.2d 894, 896 (1966); *New Jersey Sports & Exposition Authority v. McCrane*, 61 N.J. 1, 15-16, 292 A.2d 545, 552 (N.J. 1971) *appeal dismissed*, 409 U.S. 843 (1972); *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 70-71, 183 Cal.Rptr. 673, 646 P.2d 835 (1982).

That governmental interests are at the core of disputes of the present type is underscored by both the City of Oakland's eminent domain suit

against the Raiders[5] and the suit brought by the Los Angeles Coliseum, a Respondent in this action, against the City of Oakland to enjoin prosecution of that eminent domain suit on Clayton Act grounds.[6]

The decision of Petitioner NFL to maintain the Raiders' operations in Oakland was motivated by the belief that such a decision served league interests. But in making that decision, the NFL also served the interests of Oakland consumers and taxpayers by respecting the investments they had made on behalf of the NFL and the Raiders, the substantial contributions that the Raiders' franchise made to the social and economic well-being of the Oakland area, and the extraordinary fan and community support that the Raiders' franchise received during its two decades in Oakland.

Agreements that promote the public interest and further an entity's public service obligations should not be evaluated under the strict standards designed to ensure that true competitors maintain a "healthy distance from one another." (Weistart and Lowell, *The Law of Sports, supra*, at 701.) *See, Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 787, n. 17.

Even if the courts below properly limited their consideration to the intraleague competitive effects of the NFL location rule, they ignored the fact that league policies favoring franchise stability have substantial procompetitive effects in their own right. By demonstrating a sports league's willingness to respect community investments made on a team's (and, therefore, on a league's) behalf, league rules governing franchise location promote competition by facilitating the construction of stadiums, arenas and other related facilities -- construction which is without question a procompetitive factor. Stadium construction facilitates the entry of sports teams into the marketplace by eliminating barriers to entry that exist when there are no facilities. Such construction thus enhances consumer welfare by permitting fans greater freedom of choice and by promoting competition between sports and other forms of entertainment. And, by improving the quality of playing facilities, stadium construction encourages expansion of sports leagues and makes league sports a more effective competitor in the larger market for entertainment products.

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[5] *See, City of Oakland v. Oakland Raiders, supra*, 32 Cal.3d 60.

[6] *Los Angeles Mem. Coliseum Com'n. v. City of Oakland*, 717 F.2d 470 (9th Cir. 1983).

CONCLUSION

Amici urge the Court, in the public interest, to grant certiorari.

Respectfully submitted,

John W. Witt, City Attorney

Counsel of Record

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No. 84-418

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.
Petitioner,

vs.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

Brief of Respondent Los Angeles Raiders (formerly "Oakland Raiders") In Opposition to Petition for A Writ of Certiorari by Intervener Oakland-Alameda County Coliseum, Inc.

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Petitioner's first question is precluded by the concurrent findings of both courts below. The second and third questions are precluded because they merely cloak petitioner's unhappiness that the trial court did not act as an advocate for petitioner's contentions. The contention of the fourth question (Pet., pp. 16, *et seq.)* is made at much greater length in the petition for a writ contemporaneously filed by National Football League (No. 84-406), and we respond to it in the brief we file in No. 84-406.

I. The First Question: Venue

This case was instituted in 1978 in Los Angeles, in the Central District of California. That was the proper venue

under 15 U.S.C. § 15, it being the district in which all the defendants "reside" or were "found", actively conducting business there. The venue was also proper under 28 U.S.C. § 1391(b) as the district where the acts challenged as violative of the Sherman Act occurred, *i.e.*, where the "claim arose". No contention has been made to the contrary.

Defendants National Football League and member clubs do not, in their petition in No. 84-406, ask this Court to review the venue issue, and the petitioner Oakland-Alameda County Coliseum, Inc., has no standing to do so. It is only an intervener. It intervened over two years after the suit was commenced. No one sought relief against it, and none was granted. An intervener takes the case as he finds it. "[A] person intervening on either side of the controversy may not object to improper venue", *Trans World Airlines, Inc. v. C.A.B.*, 339 F.2d 56, 64 (2 Cir. 1964), *cert. denied*, 382 U.S. 842 (1965); *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976); 7A Wright & Miller, *Federal Practice and Procedure*, § 1918, p. 608 (1972); 3B *Moore's Federal Practice*, § 24.19, p. 24-208 (2d Ed. 1984).

Moreover, there is no merit to intervener's contention. As the district court's opinion denying the motion to transfer demonstrates,[1] none of the factors relevant to a motion to transfer under 28 U.S.C. § 1404(a) supports a transfer. No contention is made to the contrary. Instead, petitioner rests on the contention that trial in Los Angeles was a violation of "due process". Even were one to assume that there could be a *civil* case, as distinguished from a criminal one, where transfer could be demanded for due process reasons, that constitutional issue is not presented here. It

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[1]See Appendix to Petition, p. 61a, at pp. 64a, *et seq.*

is precluded under the "two-court" rule (*Rogers v. Lodge*, 458 U.S. 613, 623 (1982)) by the concurrent findings of the trial court and of the court of appeals that there was no bias on the part of the jury. Even the judge in the court of appeals who dissented on the merits considered petitioner's venue contention to be utterly without merit and commented (Pet., pp. 50a-51a) that, as a result of the trial court's "painstaking care" in selecting a jury, "I find that the appellants received the verdict of six fair and untainted jurors."

The petition therefore veers off in a different direction. Defendants and the intervener, not the plaintiff or the Raiders, challenged prospective jurors who showed interest in professional football. The court sustained the challenges. Intervener's argument is that its constitutional rights were violated by the court's sustaining its own challenges! It argues that a jury, drawn at intervener's own request from that portion of the 10 million people in the Central District of California who had no interest in football,[2] was not drawn from a cross-section of the community. That contention is frivolous. As the court below stated (Pet., p. 33a):

> "The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits."

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[2]The Central District of California covers seven counties, of which the County of Los Angeles is but one, and the combined population of the seven counties is 10 million (Pet., p. 71a); four of the eight jurors were residents of counties other than Los Angeles (Pet., p. 33a).

II. Second and Third Questions.

1. Petitioner's assertions at pages 2, 3, 13 and elsewhere about the relationship of the Raiders to the City of Oakland is petitioner's version. It is in conflict with the evidence introduced by the Raiders that the Oakland Coliseum was not built for the Raiders or in reliance on the Raiders remaining in Oakland, that Raiders never committed itself morally to do so, and that the Oakland Coliseum has never cost and is not likely ever to cost the taxpayers a penny. The jury rejected intervener's version. It is, moreover, irrelevant. Petitioner evidently looks to it for a factual basis for a contention that the trial court precluded the jury from considering "public interest" factors. That contention, however, cannot surmount *Nat. Soc. of Professional Engineers v. U.S.*, 435 U.S. 679 (1978), where this Court put into proper place and perspective comments in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) about "public service". Said the Court:

> "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." (p. 688)
>
> * * *
>
> "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. (p. 691)
>
> * * *
>
> "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the mem-

> bers of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." (p. 692)

This elementary law was restated as late as June 27, 1984, in *NCAA v. Board of Regents of Univ. of Okla.*, ... U.S. ....., 82 L.Ed.2d 70, 85-86, 104 S.Ct. 2948:

> "[T]he essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."

That was exactly how the case was put to the jury. It was instructed that its task was to determine whether NFL's Rule 4.3, the basis of Raiders' exclusion from Los Angeles, as "applied to the proposed move of the Raiders is sufficiently harmful to competition to outweigh any benefits to competition that Rule 4.3 may have" (Tr.2d 7216).

All the evidence defendants or intervener wished to introduce on the subject of "public interest" was received, despite our objections. The trial court then instructed the jury that it *could* consider that evidence for its bearing on whether the National Football League's Rule 4.3 was reasonable as applied to the Raiders' proposed transfer from Oakland. It instructed the jury (Tr.2d 7219):

> "You have heard testimony about representations and promises made by officials of the American Football League, including its commissioner, Mr. Foss, to the Oakland Coliseum authorities and to representatives of Oakland. . . . Such evidence was admitted for its bearing on whether NFL's Rule 4.3 is reasonable as applied to the Raiders' proposed transfer from Oakland."

As the court below observed (Pet., p. 30a) "The NFL [and intervener] was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary".

Intervener and defendants were permitted to adduce all the evidence they desired upon the Oakland situation; they were permitted to argue whatever they wished to assert, and they did so, after the court told the jury that the lawyers would "flesh out" the instructions, "expand on those instructions and relate the facts to the law as stated in these instructions and breathe life into the case" (Tr.2d 7195, 7223). Intervener's grievance is that the court did not become intervener's advocate.

2. Petitioner next argues that injury to competition in Southern California was offset by benefits to competition in Northern California by keeping Raiders there. As just seen, the issue whether anticompetitive effects were offset by procompetitive effects was put to the jury, together with the question of what was the relevant geographic market (Tr.2d 7214). The Raiders requested an instruction that "anticompetitive effects in one market cannot be offset by procompetitive effects in another market"[3] and that instruction was *denied*. The jury decided the question.

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[3]Citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 370 (1963) and other cases.

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, October 12, 1984

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IN THE
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v.

OAKLAND RAIDERS, LTD. and LOS ANGELES MEMORIAL COLISEUM COMMISSION
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL BASKETBALL ASSOCIATION IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Basketball Association ("NBA") respectfully moves for leave to file the accompanying brief *amicus curiae*. Petitioners have consented to the filing of such a brief; respondents have not.

The NBA operates a professional basketball league organized as a joint venture for the presentation of professional basketball in particular geographic locations in the United

States. As set forth in the accompanying brief, the NBA has a vital interest in the selection of geographic locations that will enhance its ability to market and promote professional basketball and to compete effectively with other forms of public entertainment. All members of the NBA are bound by contract to operate in a designated city and to seek approval from the NBA before a franchise can be relocated.

The right of the NBA to take collective action relating to the location and relocation of its franchises has been drawn into question by the decision of the Ninth Circuit in this case. In particular, shortly after that decision, and in express reliance upon it, one of the NBA's member clubs announced that it was now free to move its franchise anywhere it chose, at any time it saw fit, and it did in fact move without NBA approval from San Diego to Los Angeles, causing substantial disruption to the NBA and resulting in major contract and antitrust litigation now pending in San Diego. That suit is but the most recent example of an explosion of litigation that has been produced by the profound uncertainty surrounding the proper application of the antitrust laws to the operation of professional sports leagues.

Petitioners will necessarily concentrate on the peculiar facts of their own case. The NBA seeks leaves to file the accompanying brief to bring to the Court's attention the NBA's own long history of litigation resulting from the confusion and unpredictability as to the right of sports leagues to select the geographic location in which their teams will operate. Such pervasive confusion regarding a subject of national importance calls for authoritative clarification by this Court.

Wherefore, the NBA respectfully prays that its motion for leave to file the accompanying brief *amicus curiae* be granted.

Respectfully submitted,

/s/ Michael A. Cardozo

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Respondents.

BRIEF *AMICUS CURIAE* OF THE NATIONAL BASKETBALL ASSOCIATION IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Basketball Association ("NBA") submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The NBA operates a professional basketball league organized as a joint venture comprised of 23 members, each of which holds a franchise, granted by the NBA, for the presenta-

tion of professional basketball in particular geographic locations in the United States.[1]

The NBA is engaged in intense economic competition with other professional sports leagues as well as all other spectator sports and all forms of public entertainment for gate receipts, radio, television and cable revenue and other sources of income. All members of the NBA have a vital interest in the selection of geographic locations that will enhance professional basketball's ability to market and promote its product and to compete effectively with other forms of public entertainment.

All members of the NBA are by agreement bound by the Constitution of the NBA. Pursuant to that Constitution, each member has been granted a franchise, and has undertaken to operate a professional basketball team, in a designated city. Since its formation in the late 1940's, the NBA has always required approval by its Board of Governors before a franchise could move to another location. Nevertheless, shortly after the Ninth Circuit's decision in this case, one of the NBA's member clubs, the San Diego Clippers, announced its intention to—and in fact did—relocate its franchise to Los Angeles without seeking Board of Governors' approval. Relying expressly on the Ninth Circuit's decision, the San Diego team informed the NBA that it was now free to move its franchise anywhere it chose, at any time it saw fit, and that it would be a violation of Section 1 of the Sherman Act for the NBA *even to consider* whether or not to approve the relocation.

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1 The NBA's members are each owned and operated by one of the following entities: Atlanta Hawks Limited, Boston Celtics Corporation, Chicago Professional Sports Corporation, Cleveland Professional Basketball Company, Dallas Basketball Limited, Denver Nuggets Basketball Ltd., Detroit Pistons Basketball Company, San Francisco Warriors, Houston Rockets Professional Basketball Club, Inc., Pacers Basketball Corporation, Kings Professional Basketball Club, Inc., The Los Angeles Lakers, Inc., Milwaukee Professional Sports and Services, Inc., Meadowlands Basketball Associates, Madison Square Garden Center, Inc., Philadelphia 76ers Basketball Club, Inc., Phoenix Professional Basketball Club, Pro Basketball, Inc., Spurs Professional Basketball Limited, SDC Basketball Club, Inc., Seattle SuperSonics, Inc., Jazz Basketball Club, and Capital Bullets Basketball Club, Inc.

In the face of the $50 million damage award entered in this case by the trial court against the National Football League ("NFL")—an award which, if made against the NBA, would bankrupt it—the only prudent course available to the NBA was to schedule the Clippers' home games for the 1984-85 season in Los Angeles and to commence an action seeking a declaration that the NBA has the right, consistent with the antitrust laws of the United States, to consider, and approve or disapprove, the proposed relocation in the best interests of the League. Such an action has been commenced. An injunction directing the team to return to San Diego, as well as damages caused the NBA by the Clippers' usurpation of a valuable corporate opportunity available to all NBA members, is also sought.[2]

The Ninth Circuit has held that the NFL's rule prohibiting franchise relocation without the prior approval of three-fourths of the member clubs amounts to an agreement among independent economic competitors that unreasonably restrains trade. For the reasons outlined in the petitions and in the dissent below, this *amicus* believes the decision of the Ninth Circuit to be erroneous. Whether it is right or wrong, however, the broad contrariety of views expressed by the federal courts as to the proper application of Section 1 of the Sherman Act to the functioning of professional sports leagues has created profound uncertainty with respect to the ability of such leagues to exercise responsible business judgment in deciding upon the geographic locations in which their teams will operate. This issue affects not only the vital interests of sports leagues, but concerns as well the interests of states, municipalities, taxpayers and consumers throughout the country and presents a classic occasion for authoritative resolution by this Court.

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2 *National Basketball Association* v. *SDC Basketball Club, Inc. and Los Angeles Memorial Coliseum Commission*, No. 84-1430-N (CM) (S.D. Cal. filed June 15, 1984).

ARGUMENT

THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE AND IS SHROUDED IN THE UNCERTAINTY OF CONFLICTING AND DIVERGENT LOWER COURT DECISIONS, CALLING FOR AUTHORITATIVE GUIDANCE BY THIS COURT

The petitions for a writ of certiorari demonstrate a substantial measure of disagreement among the federal courts with respect to the application of the antitrust laws to the unified action of a professional sports league and substantial ground for urging that the decision below is wrong (Petition of NFL, pp. 6-20; Petition of Oakland-Alameda County Coliseum, Inc., pp. 19-22). Joining in those submissions without repeating them, the NBA stresses the intense national interest in the subject of the relocation of sports franchises and the high cost of continued confusion and unpredictability. While we submit that the court of appeals erred in concluding that an agreement among league members designating the locations of league operations can be a conspiracy among competitors in violation of Section 1, we would stress even more urgently the need for a clear and authoritative statement of the antitrust principles applicable to such arrangements. Indeed, the decision of the Ninth Circuit itself has apparently added to the uncertainty beclouding this critical area of sports league operations.[3]

3 As we read the Ninth Circuit's decision, it confirms that the members of sports leagues jointly produce a product that competes in a broader entertainment market and it recognizes that a league may properly impose restrictions on team movement so long as the limitations are "tailored to serve the needs inherent in producing the . . . 'product' and competing with other forms of entertainment" (Opinion below, App. A to NFL Petition, p. 26a). The court went on to suggest that antitrust concerns could be eliminated by an express recognition and consideration of various objective factors governing team relocation and the creation of a procedural mechanism to ensure consideration of those factors.

Although the NBA promptly adopted the very standards and procedures outlined by the Ninth Circuit, it was met by the subsequent action of the Clippers (represented by the same attorneys appearing for one of the

The lack of guidance in the application of the antitrust laws to league decisions concerning the location of franchises has produced an explosion of litigation. The NFL's petition for certiorari notes that no fewer than eight suits have been prosecuted in federal and state courts with respect to the move of the Oakland Raiders and that at least five actions are pending as to the recent unilateral move of the Baltimore Colts of the NFL to Indianapolis. The NBA's own experience graphically illustrates that absent an authoritative resolution of the issue by this Court, sports leagues will continue to face the prospect of protracted and burdensome litigation, and potentially devastating legal penalties, whether they permit or prohibit proposed franchise relocations:

1. In 1976, the then Buffalo Braves advised the City of Buffalo, owner of the arena in which the Braves had played their NBA games, that a transfer of their franchise to Florida was planned and that approval for the transfer would be sought from the NBA. Before the NBA had taken any action at all, the City of Buffalo filed suits in Buffalo state and federal courts seeking an injunction to prevent the NBA from authorizing any relocation out of Buffalo and $64 million in damages for alleged violations of the Sherman Act.[4] The suit, in which the plaintiff obtained a temporary order restraining any move, was discontinued only after the Braves withdrew their 1976 proposal to relocate the franchise.

2. In 1979, the NBA approved the transfer of the New Orleans franchise to Salt Lake City. The team had enjoyed little success in New Orleans and had incurred substantial

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respondents here) which moved to Los Angeles without NBA approval, contending that the Ninth Circuit's opinion supports the Clippers' view that a member of a sports league has the unfettered right to move its franchise anywhere at any time, and that *any* restriction of *any* kind on the alleged right of a team unilaterally to select the location of its games is a violation of Section 1 and subjects the league to grievous damages.

4 *City of Buffalo* v. *Atlanta Hawks,* No. 76 Civ. 261 (W.D.N.Y. filed June 15, 1976); *City of Buffalo* v. *Buffalo Braves Inc.*, No. 30407 (Sup. Ct. Erie Co. filed June 18, 1976).

losses. Nevertheless, suit was filed in a Louisiana state court by the State of Louisiana and the state agency operating the New Orleans Superdome seeking to prohibit the move and claiming $60 million in damages for alleged violations of the Louisiana antitrust laws. The City of New Orleans intervened in the action as a plaintiff. A temporary restraining order was entered prohibiting the team from playing its home games in any location outside of New Orleans. Although the NBA ultimately prevailed, it took more than four years of expensive and time-consuming litigation to defeat the damage claims.[5]

3. In June 1982, the San Diego franchise requested immediate NBA approval for a transfer of its operations to Los Angeles. Less than three weeks later, the NBA Board of Governors voted to table the matter, pending a full investigation of whether the proposed transfer would best serve the interests of the NBA. The NBA was promptly sued in Los Angeles federal court by the San Diego team,[6] which alleged that the mere consideration of its request by the NBA was a violation of the antitrust laws and that the NBA's failure to grant immediate, unquestioning approval had caused damages to the team in excess of $100 million. At the same time, the NBA was sued in a California state court by two of the San Diego team's season ticket holders, who claimed that the NBA would be in violation of the antitrust laws if it *did* approve the transfer.[7] The NBA was also threatened with suit by the City of

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5 *HMC Management Corporation* v. *The New Orleans Basketball Club*, 375 So.2d 700 (La. App. 1979). *See also County of Nassau* v. *Long Island Sports Enterprises, Inc.*, (Sup. Ct. Nassau Co. unfiled), seeking relief because of the move of an NBA team from New York to New Jersey; *D.H. Holmes Co.* v. *The New Orleans Jazz*, No. 79-11309 (Civil Ct. Parish of Orleans filed July 30, 1979), seeking damages allegedly incurred by a ticket agency because the NBA allowed the New Orleans team to move to Utah.

6 *Los Angeles Memorial Coliseum Commission and SDC, Inc.* v. *National Basketball Association*, No. 82-3165-CBM (Gx) (C.D. Cal. filed June 24, 1982).

7 *Pancer* v. *Sterling*, No. 487979 (Super. Ct. Cal. filed June 18, 1982).

San Diego and the corporation that owned the San Diego Sports Arena if it approved the relocation. In anticipation of this barrage of litigation from all sides, the NBA itself commenced a declaratory judgment action, seeking guidance from the federal court in San Diego as to the action the NBA could lawfully take.[8] The firestorm of legal activity ended only when the San Diego franchise abandoned its request to move. This respite, however, was short lived as the NBA was once again plunged into litigation when the Clippers announced in May, 1984 that it was moving to Los Angeles without seeking approval of the NBA Board of Governors.[9]

The ability to make responsible judgments about team location is fundamental to the operation of professional sports leagues. Yet the present uncertainty as to the reach of the antitrust laws has rendered sports leagues powerless to act on questions of franchise relocation without subjecting themselves to plainly unacceptable legal risks. This pervasive confusion regarding a subject of national importance calls for authoritative clarification by this Court.

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8 *National Basketball Association* v. *SDC Basketball Club, Inc.*, No. 820743-N (I) (S.D. Cal. filed June 22, 1982).

9 See n. 2 *supra*.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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Nos. 84-418, 84-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

v.

OAKLAND RAIDERS, LTD., AND
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Petitioners,

v.

OAKLAND RAIDERS, LTD., AND
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents

BRIEF FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Mayor and City Council of Baltimore ("Baltimore") is a political subdivision of the State of Maryland.[1] Baltimore is the designated "home territory" of the Baltimore Football Club, Inc., according to the Constitution and By-Laws of the National Football League

[1] This amicus curiae brief is filed pursuant to Supreme Court Rule 36.4.

("NFL"). The Baltimore Football Club, Inc. ("Club"),[2] known as the "Baltimore Colts," played its home games in Baltimore from 1947 until the end of the NFL's 1983-84 season. Throughout that period of time, Baltimore provided for the Club and other lessees the myriad services required to operate a stadium.

In the late evening of March 28, 1984, despite public statements promising that the Baltimore Colts would not leave Baltimore, the Baltimore Football Club, Inc., relocated some of its tangible property to Indianapolis, Indiana, and held itself out as the "Indianapolis Colts" team. The Club is currently playing its home games in Indianapolis' Hoosier Dome.

Baltimore has filed an action to condemn the franchise which was granted to the Club by the NFL.[3]

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[2] Baltimore Football Club, Inc., is a member of the National Football League, and a petitioner here.

[3] *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, No. B84-1294 (D. Md.). The Club has attempted to interplead Baltimore's action with the "claims" of the Capital Improvements Board of Marion County under the Board's lease with the "Indianapolis Colts." *Indianapolis Colts v. Mayor and City Council of Baltimore*, No. IP 84-652-C (S. D. Ind.), *stay of injunction issued*, 733 F.2d 484 (7th Cir.), *application for order vacating stay denied*, No. A-1014 (U.S., June 14, 1984), *order granting injunction rev'd*, No. 84-1649 (7th Cir., August 10, 1984). The Club has filed an action pursuant to 42 U.S.C. 1983, *Indianapolis Colts v. Mayor and City Council of Baltimore*, No. B84-2560. The bankruptcy petition filed against the Club in the United States District Court for the District of Maryland, Bankruptcy Unit, has been dismissed. *In re Baltimore Football Club, Inc.*, No. 84-B-0528 (D. Md.).

REASONS FOR GRANTING THE WRIT

I. Nature of the National Football League's Restraint.

This case[4] originated from the desire of the Oakland Raiders f. tball team to relocate to the Los Angeles area, despite Oakland's unflagging commitment to the Raiders for more than fifteen years. In the words of Edward Bennett Williams, owner of the Baltimore Orioles, "Teams are held in trust for the cities where they function."[5] The special status which is accorded to professional sports teams is derived in part from the predictable way in which

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[4] Baltimore is filing this brief amicus curiae in support of the petition for writ of certiorari filed by the National Football League ("NFL") and the petition of Oakland-Alameda County Coliseum, Inc., ("Oakland"), with respect to questions three, four and five presented therein. The third question presented by Oakland is stated:

> "Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering public interest factors that indirectly promote competition in assessing any competitive impact of league controls of franchise locations."

Petition for a Writ of Certiorari, *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3242 (October 2, 1984) (No. 84-418) (the "Oakland Petition"). The fourth question in the Oakland Petition is stated:

> "Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering the pro-competitive benefits in the local market abandoned by the team seeking to move and may only consider the asserted pro-competitive benefits in the local market to which the team seeks to move."

The public interest and local pro-competitive questions are addressed here in Section II. The fifth question presented in the Oakland Petition is addressed jointly in Section I with the singular question presented by the NFL.

[5] *Profession Sports Antitrust Immunity*, Hearings Before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess., at 224 (Statement of the Honorable William Donald Schaefer, September 16, 1982).

teams within the league are allowed to operate. The NFL controls various aspects of the conduct of member teams, especially the element at issue here — the prohibition against relocating a team except as provided by the NFL's Constitution and By-Laws.

The provision in the NFL's Constitution which controls the relocation of franchises requires that a team contemplating relocation receive prior "approval by the affirmative vote of three-fourths of the existing member clubs of the League." NFL Constitution and By-Laws, Section 4.3; Petition for a Writ of Certiorari, *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 (9th Cir.), *petition for cert. filed,* 53 U.S.L.W. 3242 (October 2, 1984) (No. 84-406) (the "NFL Petition") at p. 3. Such a provision is essential to the proper operation of the league, which is an industry providing profound economic and collateral benefits to its "designated cities."[6]

Baltimore believes that the NFL's right to designate a "home territory" pursuant to its Constitution and By-Laws, and its obligation to allow the relocation of any franchise only as set forth therein, are essential to the continued existence of professional football. It is only through the League's regulation of its members that fans develop the level of interest and enthusiasm in professional football which justifies the commitment of public resources to the sport. Without the expenditure of public money to finance stadia and the services which the exhibition of public events requires, professional football would never have existed in Baltimore.

Retaining the status of a "designated city" imposes considerable burdens on the city or locale which benefits

[6] An NFL member "holds a franchise from the League to operate a professional football club in a *designated city*" NFL Constitution and By-Laws, Section 3.4 (Emphasis supplied).

from the presence of an NFL franchise. The city must provide suitable accommodations for its team, and provide a full complement of support services to ensure that the public is adequately protected.

The construction and maintenance of a stadium constitute a substantial commitment of public resources. The cost is borne by patrons in the form of admission taxes, and by taxpayers in the form of debt service on bonds. For example, Baltimore's first stadium was financially unsuccessful and considered a civic extravagance for many years after its construction in 1922. *Memorial Stadium: Interim Report of Progress,* Jewell, Downing and Associates (1983) at p. 5. The present Memorial Stadium was completed in 1954, and was financed through bond issues. In the past four fiscal years, the state of Maryland and Baltimore have allocated more than seven million dollars for capital improvements to the stadium. Further, research has shown that as many as 42% of Maryland residents may visit Memorial Stadium in a given year. *Ibid.,* p. 8.

The opinion of the Court of Appeals affirmed the district court's rejection of NFL's single entity and ancillary restraint defenses. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 (9th Cir. 1984). The key reason why the NFL's ancillary restraint defense was rejected is that the court thought that local governments should be capable of protecting themselves through the leases negotiated with member clubs. *Los Angeles Memorial Coliseum v. National Football League,* 726 F.2d at 1397; NFL Petition at 25a-26a. Baltimore's experience has disproved that notion.

Preservation of the NFL's authority to regulate the transfer of franchise is an important aspect of preserving the reason for investing in local sports teams. Market forces do not and will not set the terms of stadium leases

so that local governments are able to obtain reasonable financial protection for their investment. The economic burden of funding the construction of a stadium is profound. In Oakland's case, the stadium authority issued sixty million dollars in bonds, with payments extending to the next century. Oakland Petition, p. 3. In Baltimore's case, the State of Maryland had considered and approved a twenty-two million dollar package to renovate Baltimore's Memorial Stadium before the Colts slipped their reins. Additionally, Baltimore has required that concessionaires in the stadium spend more than two million dollars to improve facilities there.

The reason why market forces will never operate freely is that there is no equivalence between the revenue generated by a stadium lease and the benefits to the community at large. An NFL franchise produces its greatest benefit to a municipality in an indirect fashion. The nature of this "industry," as it was called by Mayor William Donald Schaefer,[7] is such that lease revenue is almost negligible compared to the ripple throughout the local economy of money spent by fans enjoying NFL football.

For example, the Colts paid Baltimore for the use of Memorial Stadium according to a formula, resulting in total payments to Baltimore of $149,728.00 for the 1983-84 season. Mayor Schaefer estimated before Congress that the Colts generated about twenty million dollars [per year] in economic benefit to Baltimore City.[8] Of course, this effect is very diverse, and it strengthens

[7] *Profession Sports Antitrust Immunity,* Hearings Before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess. 225 (Statement of the Honorable William Donald Schaefer, September 16, 1982).

[8] *Ibid.*

segments of the economy ranging from payroll taxes for governments to patronage at restaurants and hotels.

Net Profit or (Loss) from the Operation of Memorial Stadium for the Benefit of the Baltimore Colts, by Fiscal Year

Fiscal Year	Lease Payments	Amusement/ Admissions Tax Receipts	Operational Costs [3]	Net Profit (Loss)
1984 [1]	$149,728.00	$399,988.00	$596,948.00	($ 47,222.00)
1983	$ 23,760.00 [2]	$163,804.00	$568,675.00	($381,111.00)
1982	$143,880.00	$378,369.00	$542,351.00	($ 20,102.00)

1. Baltimore's 1984 Fiscal Year begins July 1, 1983, and ends June 30, 1984.
2. Lease payments were significantly reduced by the NFL players' strike.
3. These costs do not reflect depreciation, renovation or replacement of the structure itself.

It is readily apparent that the rental paid to Baltimore pursuant to its lease with the Club represents only three-quarters of one percent of the total economic impact which the franchise had upon the City of Baltimore. It is impossible for a municipality to protect the varied and diverse economic interests of its inhabitants through the mechanism of a stadium lease. The inducement for a franchise to remain in a designated city is usually subsidized rental payments in exchange for the expectation of the continued presence of the team, and the panoply of benefits which flow therefrom. Damages at law against a defaulting or absconding franchise for breach of the lease agreement would return only a small fraction of what the local community lost.

Furthermore, the position that long-term leases afford cities the protection which their investments demand is not itself without risk of antitrust liability. Apart from undermining the ability of public authorities to rely on *league* agreements concerning the location of teams, the decisions below have other sweeping implications for public authorities in their dealings with individual teams. If, as the Court of Appeals held, agreements that limit the ability of stadia to secure tenants may unlawfully restrain competition in a stadium market irrespective of the volume of commerce involved (726 F.2d at 1394), then the

Court of Appeals' reasoning raises serious questions as to the validity of long-term stadium lease agreements between stadia and professional teams. Such agreements involve, by definition, stadia that are competitors of other stadia in such a market, and such agreements restrain competition among stadia in the same manner as the NFL's location agreement found unlawful in this case. Indeed, the Ninth Circuit itself has already held long-term stadium concession contracts to violate the Sherman Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303-05 (9th Cir. 1982). *See also Hecht v. Pro Football, Inc.*, 570 F.2d 982, 996 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) (stadium lease provision may violate Sherman Act although used for sound business reasons). The Court of Appeals thus ignored the evident implications of its own holdings in suggesting that long-term stadium leases will adequately protect local governments in the absence of a league say on team location matters.

II. "Rule of Reason" Analysis Under the Sherman Act Must Include considerations of Public Interest.

The Court of Appeals declined to find that Section 4.3 of the NFL's Constitution and By-laws was a *per se* violation of the Sherman Act, 15 U.S.C. section 1. The court's decision was therefore predicated upon its determination "whether [Section 4.3] reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public." 726 F.2d at 1392; NFL Petition at 16a. This was essentially the factual question presented to the jury, but without any instruction that it could consider matters of public interest, or the pro-competitive effects which would be lost by a city when a sports franchise abandoned it. Oakland Petition, pp. 12-18.

The court's assessment of the reasonableness of Section 4.3 depended, in part, on its observation that stadia are distinct economic entities, and areas or territories are not. In a rule of reason analysis, the finder of fact should consider the reasonableness of the actions complained of in light of all of the circumstances. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982). The NFL correctly argued that it is places, not stadia, which compete for NFL franchises. Baltimore's experience has demonstrated that the Maryland General Assembly treats the presence of professional sports as a matter of state-wide importance, and has offered throughout the years to support sports franchises with state dollars. The Mayor and City Council of Baltimore have made every attempt to provide for sports teams and their patrons the highest quality stadium allowed by its budget.

The financing of sites for the exhibition of NFL football and the support of the teams are largely public responsibilities. The prestige associated with professional sports franchises, especially successful ones, and the direct and diffuse economic benefits are great enhancements to a city.

As set forth above, cities with existing stadia are often willing or required to subsidize the actual cost of public facilities in order to attract or retain sports franchises. Cities which lure franchises to their domain must incur profound debt to construct the sort of stadium which is attractive to franchise owners.

The condition of Baltimore's Memorial stadium was an area of controversy in the aborted negotiations between the Colts' management and Baltimore's city officials. Team owners are in a position to demand that stadia have elegantly appointed accommodations befitting the owners of multimillion dollar enterprises. The State of Maryland had undertaken to sponsor a twenty-two million dollar

bond issue to renovate its stadium, contingent upon having a 15-year lease ratified by the Colts and the Orioles. Chapter 529, Laws of Maryland (1980).[9] Had the Club left Baltimore after the 1984-85 season, and after the bond issue, the taxpayers of Maryland would have found themselves saddled with payments to improve a stadium empty for much of the year.

Certainly the public interests of the home territory of a team are to be considered in an assessment of whether actions taken to restrain a team's relocation are reasonable. Given the enormous public investment in professional sports, whether provided directly for a league's "product" or indirectly from the public treasury, precedent that public interest may not be considered under a rule of reason analysis will have a devastating effect upon every city's ties with professional sports.

This Court has found that the antitrust laws are first and foremost consumer welfare laws, designed to protect the public from the economic burdens imposed by unreasonable business agreements. When such agreements or combinations are "unresponsive to consumer preference," the likelihood increases that a violation of antitrust laws will be found. *NCAA v. Board of Regents*, ___ U.S. ___, 104 S. Ct. 2948 (1984). Where, as in the case of the National Football League, the consumer's interest is served and protected through control over franchise location and relocation, public interest considerations

[9] The period in which the leases were to be ratified was extended through June 1, 1983, by Chapter 552, Laws of Maryland (1982). The bond authorization was modified by Chapter 496, Laws of Maryland (1983), which reduced the authorized issue to $15 million, and further provided that $7.5 million may be made available upon the signing of a six-year lease by either team.

should be given great importance. The Court of Appeals' analysis fails to protect adequately the interests of the taxpayers of the abandoned designated city.

CONCLUSION

The petition for a writ of certiorari submitted by the National Football League (No. 84-406) should be granted, and the petition for a writ of certiorari submitted by the Oakland-Alameda, Coliseum, Inc. (No. 84-418) should be granted with respect to the third, fourth and fifth questions presented.

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No. 84-406
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Respondents.

Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Los Angeles Memorial Coliseum Commission In Reply to "Brief of Public Entities as Amici Curiae In support of Granting Writ of Certiorari", and In Reply to "Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners".

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No. 84-406
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Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Los Angeles Memorial Coliseum Commission In Reply to "Brief of Public Entities as Amici Curiae In support of Granting Writ of Certiorari", and In Reply to "Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners".

As our reply to the brief of "public entities" City of San Diego and others was in printed proof, the amicus brief of Baltimore arrived. We shall refer to the brief of "public entities" as the "amicus brief" and reply to the Baltimore brief in Part III below. The amicus brief exhibits unawareness of the facts of the case, of what the issues were, and of what was decided. Its argument is reducible to two themes: (1) that cities need protection, that those named as *amici* wish to place themselves in the autocratic hands of clubowners for that protection, and that sports leagues have an interest in the location of members; and (2) that factors other than competition should override the Sherman Act.

I. First Theme: Supposed Need of Protection of Cities to Be Vested in the League, Not in Free Competition.

The *amicus* brief asks (p. 1) how cities can protect their investments in stadia and the like. The court below gave the answer in its opinion: "through the leases they negotiate with the teams for the use of their stadia" (p. 26a of Petition in No. 84-406). Indeed, the *amicus* brief reveals (p. 6) that many cities have leases of terms for as long as 30 years. The opinion below also observes (at same page) how precarious is protection placed in the clubowners' hands.[1] But, in any event, however differently the particular cities lining up as *amici* may feel, the Sherman Act commands that protection be vested in the free competitive operation of the market, not in cartelized hands.[2]

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[1]Several of the *amici* cities obtained football clubs by attracting them away from others. San Diego took the *Chargers* from Los Angeles, and Irving, Texas, took the *Cowboys* from Dallas. In baseball, which is not subject to the Sherman Act and where the leagues are free to "protect" the cities, San Diego took its baseball club, the Padres, from Washington, D.C., Atlanta took its club from Milwaukee, and Oakland took its from Kansas City.

[2]Notably absent from the list of cities joining in the *amicus* brief are Anaheim, which obtained the Rams from Los Angeles by free

When the *amicus* brief speaks (p. 1) of "willy-nilly relocations", it is not looking at *this* case (except so far as the removal of the Los Angeles Rams from Los Angeles to Anaheim, with the approval of NFL, was a "willy-nilly" relocation). After remaining in one location for two decades, the Raiders had to move to Los Angeles because the Oakland stadium had become too small and out-of-date to produce the revenue needed for a club to be competitive with the other clubs in the '80s.[3]

In its contention that a sports league has an interest in the location of its members, the *amicus* brief ignores the fact that the present case has nothing whatever to do with a rule stating objective standards about relocation, impartially applied.[4] And when *amici* assert (p. 9) that "strict standards" should not be applied to the sports area, they ignore the fact that "strict standards" were not applied in this case; the case went to the jury for decision on the Rule of Reason under a set of instructions remarkably generous to NFL.[5]

Amici's contention (p. 3) is that "the NFL's franchise location rule . . . cannot as *a matter of law* violate Section 1 of the Sherman Act". That, it will be noted, is at the opposite pole from a contention that the NFL rule cannot be declared illegal as a matter of law. It is a contention that as a matter of law the rule cannot be held illegal at all, even though, as here, it is found by the fact-finder to be

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competition, and Los Angeles, which obtained a replacement by the free competition permitted by the decision in this case.

The operation of free competition has given several of the *amici* cities football clubs in the new U.S. Football League, *viz.*, Oakland, Pittsburgh, New Orleans, and Tampa.

[3]See p. 5 of Raiders' brief in No. 84-406. Raiders left Oakland only after expiration of their lease.

[4]See pp. 12, 13 of Raiders' brief in No. 84-406.

[5]See pp. 10, 12 of Raiders' brief in No. 84-406, and pp. 5, 6 of Raiders' brief in No. 84-418.

an unreasonable restraint of trade. Nor do *amici* explain by what reasoning the NFL rule is exempt from antitrust analysis. Cut from the same cloth is the assertion by *amici* that the decision in this case against NFL's relocation rule "ignored the fact that league policies favoring franchise stability have . . . pro-competitive effects" (p. 9). But the issue whether the NFL rule involved in this case and as here applied was pro-competitive or anticompetitive was put to the jury, the fact-finder, and it found that it was anticompetitive, that it had nothing to do with "stability". One allied product of gratuitous fantasy is *amici's* statement (p. 9) that NFL's decision "to maintain the Raiders' operations in Oakland was motivated by the belief that such a decision served league interests". On a mass of evidence, the jury found that decision to be arbitrary, in violation of the obligation of good faith and fair dealing, inspired by animosity and the selfish interests of various clubs, and not by any legitimate league interest.[6]

Because the *amicus* brief (p. 8) summons to its aid an anonymous editorial in a newspaper,[7] we adopt as part of our argument the words of a person whom NFL's petition (in No. 84-406, p. 7) includes among qualified "economists and commentators", Mr. L. Koppett. In an article in *The Sporting News* of February 14, 1981, entitled "Raiders Move No Blow for Anarchy", Mr. Koppett wrote that if NFL's specific relocation rule were adjudicated to be illegal

> "[t]he league would simply have to adopt a new rule, more compatible with the antitrust laws, for future cases.
>
> "This has already happened with respect to the college draft and the Rozelle Rule (about compensation

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[6] See pp. 6-7 of Raiders' brief in No. 84-406.

[7] *USA Today*, until recently an affiliate in the Gannett chain of the Oakland *Tribune*, hardly an impartial observer.

for a free agent who changes teams). The old rules the NFL had on these points were found to be illegal under the antitrust laws, several years ago, in several lawsuits.

"The league had to create more suitable rules, which the courts then approved.

"At the time, we heard the same cries from the NFL commissioner, its lawyers and most club owners that 'the game as we know it' would be hopelessly wrecked if the old, restrictive draft and reserve rules were weakened. But the last time I looked, the draft was still in existence, the NFL was boasting about setting attendance records in 1980, television income was at an all-time high and most players were reporting for work at the right time and actually following the instructions of their coaches.

"So a Raiders move to Los Angeles, if permitted by the courts, will be serious enough to those involved, but hardly the signal for bloody revolution on the pro football front."

II. Second Theme: Appeal to Factors Unconnected with Competition.

The *amicus* brief asserts (p. 2) that "the courts below failed to give due consideration to the equally important 'investment' of community spirit and pride in local sports teams" and that the antitrust laws were not "intended to frustrate or undermine the public interest". So far as any notion about competition is embodied in the word "public interest", it *was* given to the jury to consider. So far as the words "public interest" relate to factors not connected with competition, they lie outside the antitrust law.[8] If they are to supplant the antitrust considerations made

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[8]See pp. 4, 5 of Raiders' brief in No. 84-418.

paramount by the Sherman Act, only Congress may say so. And, as for the suggestion by *amici* (p. 1) that the City of Oakland relied on some commitment that the Raiders would stay in Oakland, given when the Oakland stadium was built, it is contrary to a finding implicit in the jury verdict that there was no such reliance.

Amicus brief says nothing not said at greater length in the petitions in 84-406 and 84-418. Amici's reliance on *Copperweld Corp. v. Independence Tube Corp.*, ... U.S. ....., 81 L.Ed.2d 628, 104 S.Ct. 2731 (1984), and on Justice Rehnquist's dissent from denial of certiorari in *National Football League v. North American Soccer League*, 459 U.S. 1074 (1982), is answered in our brief in No. 84-406, at pp. 17-20.

Amici (p. 2) argue that consideration should not be focused on "sports competition among the NFL teams" but on an "economic competition among different sports and between sports and other entertainment". But the trial court put to the jury the question of what constituted the "relevant market" and called to its attention NFL's contention that the relevant market was the entire field of entertainment. The jury rejected that claim.*

III. Reply to Amicus Brief of Baltimore.

Our reply to Baltimore may be short: It raises no issues under the Sherman Act.

Baltimore's first argument is that long-term stadium leases are not sufficient protection to a city, because the tenant may breach the lease and the damages may not be reparable by a money award. The answer is obvious: A city so circumstanced may sue for and obtain an injunction under state or common law, as was done by New York in *City of New York v. New York Jets Football Club, Inc.*, 394 N.Y.S.2d 799 (1977).

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*See pp. 18, 19 of Raiders' brief in No. 84-406.

We do not know how accurate is Baltimore's description of its relation to the *Colts* and of its reliance and dependency on the *Colts*. But it is not true of Oakland and the Raiders, as we pointed out in our brief in response to the petition in No. 84-418 (at p. 4).

Baltimore's second point is the same one about "public interest" factors answered at pages 4 and 5 of our brief in No. 84-418.

Baltimore's appeal is simply one that should be addressed to Congress. Indeed, the same arguments *were* presented to Congress by the Mayor of Oakland and its counsel and by Congressmen from the area where Oakland is located.[10]

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[10]See pages 348-353, 408-422, 608-620 of Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports, Serial No. 114.

CONCLUSION

The list of *amici* cities is simply part of NFL's whipped-up publicity claque so active in the media and in lobbying in Congress and adds nothing to the case. We respectfully submit that neither *amicus* brief adds any intellectual content to the attempt to obtain a review by this Court and that the petitions should be denied.

Dated: October 18, 1984

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,
vs.
OAKLAND RAIDERS, LTD. and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents

JOINT OPPOSITION TO NATIONAL BASKETBALL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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JOINT OPPOSITION TO NATIONAL BASKETBALL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

I. Permission for NBA to File an Amicus Brief Should Be Denied.

Respondents object to the motion of National Basketball Association ("NBA") for leave to file an *amicus* brief, and for two reasons.

First: NBA has not been diligent. On October 4, 1984 NBA's counsel requested consent to file from counsel for respondent Los Angeles Memorial Coliseum Commission and was refused. On October 4th, NBA counsel telephoned counsel for respondent Los Angeles Raiders, who was not then in his office, and did not pursue the request until October 8th. Consent was then refused. NBA should have filed its motion promptly. Raiders' counsel did not receive

a copy of the motion until October 18th, the very day on which respondents' joint brief in reply to the other *amici* briefs was transmitted for filing. Had the motion been presented sooner, a reply to it could have been included in respondents' joint reply to the other *amici* briefs.

Second: NBA's proposed brief does not assail the correctness of the decision of the Court of Appeals in this case, beyond a token statement that "we submit that the Court of Appeals erred" (p. 4). Instead, its discussion proceeds on two irrelevancies, both on the assumption that the decision below is correct. The first is that this Court should use the present case as a vehicle to provide a general disquisition or treatise on what might be called "the law of club relocation in professional sports" (p. 4). NBA laments that every relocation of a sports club produces a flurry of litigation with suits seeking to condemn sports clubs under eminent domain law, suits brought to enjoin suits under eminent domain law, suits for injunctions under common law or other state law suits under state antitrust laws, and the like. There is no way to prevent litigation in a litigious society. It is not a function of *certiorari* jurisdiction to utilize a particular case to resolve all the problems of society.

NBA's second reason for seeking *certiorari* is that, while it sought to amend *its* own relocation rule after the decision below, nevertheless *its* proposed rule is being assailed in current litigation. This is a request that the Court use the present *certiorari* petitions as a vehicle to issue an *advisory* opinion to govern the outcome of NBA's litigation concerning its own relocation rule, in which it had so little confidence that it allowed the Clippers to move without compliance.[1]

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[1]By contrast the NFL refused to permit the Raiders to move and successfully opposed a preliminary injunction by arguing that damages would be an adequate remedy.

For these reasons we submit that leave to file the brief should be denied. If, however, leave should be granted, we proceed below to answer the brief.

II. The NBA Has Not Devised Any Arguments Which Would Justify This Court's Grant of Certiorari.

NBA's motion for leave to file an *amicus curiae* brief seeks to induce this Court to grant *certiorari* on the false premise that the federal courts are unable to cope with the application of the antitrust laws to sports leagues. Accordingly, NBA concludes that sports leagues must be exempt from those laws.

The facts simply cannot be manipulated to support this incorrect image. As discussed in respondents' briefs, the circuits have been uniform and consistent in applying the Sherman Act to joint conduct by sports clubs. The lower courts have unanimously rejected the claim that sports clubs constitute a "single enterprise" not subject to Section 1 of the Sherman Act. Those circuits have also agreed that such conduct should be evaluated by the traditional Rule of Reason analysis prescribed by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982) *cert. denied*, 459 U.S. 1074 (1982); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

Where the conduct at issue has been shown to have an anticompetitive purpose and effect, it was found to violate the Sherman Act. *E.g., NASL v. NFL, supra.* Where the conduct was shown to be for a legitimate purpose and to have no anticompetitive impact, it was upheld. *E.g., Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979)

(hockey league's safety rules upheld); *Molinas v. National Basketball Association*, 190 F.Supp. 241 (S.D. N.Y. 1961) (upholding league's rules on gambling).

Thus, the antitrust laws have been applied to the sports industry in precisely the same manner as any other industry, with no greater uncertainty or confusion. The only distinction is that the courts have applied the Rule of Reason to evaluate conduct by sports leagues which in any other industry would be condemned out of hand under a *per se* analysis. For example, the division of territories into exclusive markets which was the subject of this lawsuit is automatically condemned under the Sherman Act in any other industry.[2] *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). The Rule of Reason case-by-case approach surely involves less certainty than the extremes of the spectrum — *per se* condemnation or immunity. But it is the best mechanism for assuring that anticompetitive schemes are rejected while neutral or pro-competitive arrangements are permitted.

Contrary to NBA's brief, most sports league relocations are accomplished without litigation. Moreover, the brief flurry of lawsuits relating to moves by the Raiders and Colts were largely state court claims for breach of contract or eminent domain. Such actions would be unaffected by a grant of *certiorari* here. The same is true for the suits filed in the 1970's over the relocations of the Braves and the Jazz.[3]

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[2]The NFL's division of territories not only prevented head-to-head competition between the Rams and the Raiders but prevented the Raiders from competing with *all* NFL clubs for the revenue needed to acquire the best players, coaches and facilities.

[3]*City of Buffalo v. Atlanta Hawks*, No. 76 Civ. 261 (W.D.N.Y. 1976); *City of Buffalo v. Buffalo Braves, Inc.*, No. 30407 (Sup. Ct. Erie Co. 1976)

As to the "firestorm of legal activity" relating to the Clippers' relocation to Los Angeles, NBA neglects to mention that the *only* lawsuit filed in connection with the Clippers recent move was filed by the NBA itself. The recent circuit court decisions in this area have apparently settled the law in the eyes of everyone except NBA, which simply refuses to accept the outcome.

CONCLUSION

It is not the courts which are confused by the application of traditional antitrust principles to sports leagues. Nor are the leagues themselves genuinely confused; they simply are adamant in their refusal to accept that they are subject to the antitrust laws.

Large portions of the NBA's brief are lifted verbatim from testimony which an NBA spokesman recently gave in Congress. The NBA's plea for special treatment and immunity from the Sherman Act, like the NFL's, is properly addressed to Congress.

Respectfully submitted,

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